No. 10-

Supreme Court, U.S.
FILED

177

10-804

DEC 15 2010

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IN THE

Supreme Court of the United States

ALFORD JONES,

Petitioner,

v.

ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND MICHAEL CALLAHAN, ADMINISTRATOR OF RUTHERFORD CORRECTION CENTER,

Respondents.

FAYE BROWN,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND KENNETH ROYSTER, SUPERINTENDENT OF RALEIGH CORRECTIONAL CENTER FOR WOMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of North Carolina correctly held that the Due Process Clause permitted the State to continue to incarcerate petitioners even though they had been awarded sufficient sentence-reduction credits to mandate release.

2. Whether the Supreme Court of North Carolina correctly held that the Ex Post Facto Clause permitted the State to refuse to honor the sentence-reduction credits awarded to petitioners as prescribed by law at the time of petitioners' offenses.

PARTIES TO THE PROCEEDINGS

In *Jones* v. *Keller*, the petitioner is Alford Jones, the petitioner and appellee in the courts below. The respondents are Alvin W. Keller, Secretary of the North Carolina Department of Correction, and Michael Callahan, Administrator of Rutherford Correctional Center. Keller was respondent and appellant below; Callahan has been substituted for Susan R. White, Administrator of New Hanover Correctional Center, because Jones has been transferred from New Hanover to Rutherford.

In *Brown* v. *Department of Correction*, the petitioner is Faye Brown, the petitioner and appellee below. The respondents are the North Carolina Department of Correction, Alvin W. Keller, Secretary of the North Carolina Department of Correction, and Kenneth Royster, Superintendent of Raleigh Correctional Center for Women, the respondents and appellants below.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

Alford Jones and Faye Brown respectfully petition for a writ of certiorari to review the judgments of the Supreme Court of North Carolina.

OPINIONS BELOW

The opinions of the Supreme Court of North Carolina are reported at 698 S.E.2d 49 and 697 S.E.2d 327 (N.C. 2010). App. 1a-32a; App. 35a-36a. The opinions and orders of the Superior Court are unreported. App. 39a-66a; App. 67a-94a.[1]

JURISDICTION

The Supreme Court of North Carolina entered its judgments on September 16, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).[2]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. amend. XIV, §1.

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[1] Faye Brown's case was decided by a per curiam order for "the reasons stated in *Jones*." App. 35a. The same Superior Court Judge conducted the evidentiary hearings related to petitioners' habeas petitions and, on substantially identical records, granted the petitions in materially identical orders. *Compare* App. 39a-66a, *with* App. 67a-94a. The issues in these cases are factually and legally indistinguishable, and they are presented together for the convenience of the Court. S. Ct. R. 12.4. For clarity, this petition tracks the opinion below and refers only to Jones, but all arguments are made on behalf of both petitioners.

[2] The Supreme Court's opinions were filed on August 27, 2010. Its judgments were entered twenty days after the filing of the opinion. N.C. R. App. P. 32(b). Certified copies of the judgments are included in the Appendix. App. 33a-34a; App. 37a-38a.

The Ex Post Facto Clause provides in relevant part:

> No State shall ... pass any ... ex post facto Law.

Id. art. I, §10, cl. 1.

STATEMENT

Petitioner Alford Jones is one of approximately 145 current North Carolina inmates sentenced to "life" imprisonment for crimes committed between 1974 and 1978, when North Carolina law provided that "[a] sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years." N.C. Gen. Stat. §14-2 (1974). He has been an exemplary prisoner for over 35 years. Over that time, the North Carolina Department of Correction ("DOC") has awarded him a substantial number of good-time, gain-time, and merit-time credits for his good behavior and meritorious conduct. DOC regulations define these credits as "Sentence Reduction Credits—[t]ime credits applied to an inmate's sentence that reduce[] the amount of time to be served." Department of Correction, Division of Prisons, Policy and Procedure, ch. B, §.0110(f) (2007) ("2007 Policy and Procedure") (App. 201a).

As of February 2006, Jones had earned and been awarded sufficient sentence-reduction credits to mandate his release. Yet, because he was serving a "life" sentence, DOC refused to apply his sentence-reduction credits to reduce his sentence. As a result, he remains incarcerated—with a release date in 2055—despite having completed his lawful sentence years ago.

This Court has repeatedly held that the Due Process and Ex Post Facto Clauses bar States from arbi-

trarily depriving inmates of the benefit of sentence-reduction credits or other release opportunities earned under existing state law, either by failing to apply the law faithfully or by applying changes in the law retroactively. *See, e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Lynce* v. *Mathis*, 519 U.S. 433 (1997); *Weaver* v. *Graham*, 450 U.S. 24 (1981). The North Carolina Supreme Court nonetheless concluded that DOC could constitutionally refuse to release Jones and other similarly situated inmates. It reasoned that DOC's determination that Jones might present a threat to public safety outweighed "any limited due process liberty interest" he had in having his sentence-reduction credits used to reduce his sentence. App. 12a.

That reasoning and holding cannot be reconciled with this Court's Due Process and Ex Post Facto Clause precedent, or with the manner in which other courts have interpreted and applied that precedent. Moreover, the result of the decision below is that approximately 145 North Carolina inmates in petitioner's position are now serving sentences longer—typically far longer—than permitted by law. Many, like Jones, were entitled to release years ago but are now unlikely to live to their release dates. This is an exceptional, and exceptionally important, case. This Court should grant review.

1. Factual and Legal Background. In 1975, petitioner Alford Jones was convicted of one count of first-degree murder. He received a mandatory death sentence, but that sentence was vacated after this Court held mandatory capital punishment unconstitutional in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). On September 27, 1976, Jones was resentenced to "life" imprisonment.

When Jones was sentenced, and for a period from 1974 to 1978, the governing North Carolina statute provided that "[a] sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years." N.C. Gen. Stat. §14-2 (1974) (the "80-year provision").[3] In general, a North Carolina offender may discharge a term-of-years sentence either through earning conditional release such as parole, or through unconditional release—serving the applicable sentence reduced by any time credits awarded for good behavior or productive work.

Although the statute provided that Jones's "life" sentence "shall be considered as a sentence of imprisonment for a term of 80 years," DOC recorded Jones's sentence as though he had received an indeterminate life sentence. DOC recorded Jones's expected release date as "99/99/99" or "Life"—designations used for indeterminate life sentences with no expiration or release date. *See* App. 157a-158a. That erroneous designation did not, however, preclude Jones from earning and being awarded a substantial number of sentence-reduction credits under DOC's rules and regulations.

When the 80-year provision took effect in 1974, North Carolina law had long granted the Secretary of Correction and his predecessors the power to enact "rules and regulations" governing "allowances of time for good behavior" to reduce prisoners' sentences or

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[3] Although Jones was technically sentenced pursuant to 1973 North Carolina Session Laws, chapter 1201, section 7, his "life" sentence is governed by North Carolina General Statute §14-2 and this petition adopts the convention of the North Carolina Supreme Court in referring to him as "sentence[d] under ... §14-2," App. 15a.

accelerate their eligibility for parole. N.C. Gen. Stat. §148-11 (1955); *id.* §148-13 (1955); *id.* §148-13 (1974). At first, the Secretary exercised that power by promulgating internal policies governing sentence-reduction credits. After enactment of the North Carolina Administrative Procedure Act, N.C. Gen. Stat. §§150B-1 *et seq.*, in 1973, the Secretary promulgated formal regulations codifying those policies and practices. *See* App. 97a-98a.

DOC's regulations provided that prisoners would be awarded sentence-reduction credits for good conduct ("Good Time" credits) and productive work ("Gained Time" credits). The regulations mandated that, once awarded, "Good Time shall be subjected to forfeiture [only] for misbehavior," and "Gained Time shall not be subjected to forfeiture." 5 N.C. Admin. Code 2B.0101, 2B.0102 (1976) (App. 177a).[4] The regulations specifically provided that "[*a*]*ll* inmate[s], including ... those with life terms," were eligible for Good Time and that "[*a*]*ll* inmates who perform work ... shall be allowed additional Gained Time." *Id.* (emphasis added). DOC applied these credits to reduce the sentences of prisoners serving terms of years. For inmates serving indeterminate life sentences, DOC ap-

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[4] At the time Jones committed his crime and was sentenced, the regulations provided that inmates "shall be allowed a maximum of 107 days Good Time for acceptable behavior for each year served" and that additional Gained Time "equivalent to [6.89% to 18.98%] of the remaining sentence" "shall be allowed" for full- or part-time work or participation in training programs. 5 N.C. Admin. Code 2B.0101, 2B.0102 (1976) (App. 177a-179a). In the manual provided to North Carolina inmates in 1976, Good Time and Gained Time were discussed under the heading "Sentence Reductions" and referred to as providing "reduction[s] in sentence." App. 181a.

plied good-time and gained-time credits to determine parole eligibility and custody grade, and to reduce the sentence if it were commuted to a term of years. *See* App. 98a.

In 1979, the North Carolina Fair Sentencing Act ("FSA") eliminated the Secretary's discretion to provide sentence-reduction credits to certain classes of future inmates, but reauthorized the Secretary to promulgate regulations regarding "deductions of time" for all pre-FSA inmates, including those sentenced under the 80-year provision. *See* 1979 N.C. Sess. Laws, ch. 760, §4 (codified in relevant part at N.C. Gen. Stat. §148-13(b)). In 1983, pursuant to that authorization, the Secretary issued regulations providing that "*all* inmates sentenced for crimes committed before July 1, 1981 ... shall be allowed" day-for-day good time and gain time at specified rates. 5 N.C. Admin. Code 2B.0102, 2B.0103 (1983) (emphasis added) (App. 183a-184a); *see also id.* 2B.0101 (regulations "establish[] a method of computing" those credits). As in prior regulations, the Secretary provided that good time "shall be subject to forfeiture ... for major infractions," but that gain time "shall not be subject to forfeiture." *Id.* 2B.0102, 2B.0103 (App. 184a-185a).[5]

In 1994, after DOC's regulations were removed from the Administrative Code, *see* 1991 N.C. Sess.

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[5] Section 148-13(b) was repealed in 1994 as part of North Carolina's Structured Sentencing regime, *see* N.C. Gen. Stat. §§15A-1340.10 *et seq.*, but the new law contained a savings clause providing that "the statutes that would be applicable to [pre-existing] sentences ... remain applicable," 1994 N.C. Sess. Laws, ch. 24, §14(b). This clause provides the present statutory authority for the regulations at issue.

Laws, ch. 477, §3, the Secretary issued an internal "Policy and Procedure" substantially identical to the regulations as previously set forth in the Administrative Code. These regulations defined good, gain, and merit time as "credits applied to an inmate's sentence that reduce the amount of time to be served." Department of Correction, Division of Prisons, Policy and Procedure, ch. B, §.0110(6) (1995) (defining "Sentence Reduction Credits") (App. 192a). While the Secretary specifically excluded seven categories of inmates from receiving sentence-reduction credits, inmates sentenced under the 80-year provision are not among them. *See id.* §§.0111, .0112 (App. 194a-196a). To the contrary, in the regulations currently in effect, "inmates sentenced as felons for crimes they committed prior to October 1, 1994" are specifically named as among those who "are awarded" or "shall be allowed" those credits. 2007 Policy and Procedure, §§.0110, .0112, .0113 (App. 200a-203a).

Jones has been a model prisoner. He entered the prison system at age twenty, and over thirty-five years of imprisonment he has earned his General Equivalency Diploma, married, and successfully held many jobs, some of which required him to work outside the prison. *See, e.g.*, App. 124a-126a. His good conduct and productive work have earned him 14,041 days of good time, 2,146 days of gain time, and 1,745 days of merit time under DOC's regulations. App. 57a. It is undisputed that, if the credits he earned had been applied to reduce his sentence, Jones would have been entitled to unconditional release in February 2006. App. 58a.[6]

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[6] Brown has similarly worked outside of prison since 1989 and has earned substantial periods of unsupervised community release.

In 2005, another inmate sentenced under the 80-year provision, Bobby Bowden, filed a state habeas petition seeking his release on the ground that, when the good time, gain time, and merit time he had earned were applied to reduce his sentence, he had fully served his 80-year prison term. The State argued in response that the statute's 80-year provision "does not govern the length of defendant's sentence in prison, but applies only when determining his eligibility for parole." *State* v. *Bowden*, 668 S.E.2d 107, 109 (N.C. Ct. App. 2008). The North Carolina Court of Appeals unequivocally rejected that argument, holding that the statute "treats defendant's life sentence as an 80-year sentence *for all purposes*. ... The plain language of the statute states that life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison without any limitation or restriction." *Id.* at 109-110 (emphasis added). It remanded for a determination of the precise number of credits Bowden had earned.[7]

In response, state officials released a list of prisoners (including Jones and Brown) who had been sentenced under the 80-year provision and had earned sufficient sentence-reduction credits to entitle them to release, stating that DOC had "no choice but to release them" on October 29, 2009, the anticipated date of the

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See App. 153a-154a. Her good conduct and productive work have earned her 14,103 days of good time, 2,419 days of gain time, and 484 days of merit time—credits that, if applied to her sentence, would have entitled her to release in February 2009. App. 85a-86a. Her current release date is August 2055. App. 84a.

[7] The North Carolina Supreme Court granted review in *Bowden*, but subsequently dismissed it as improvidently allowed. *State* v. *Bowden*, 683 S.E.2d 208 (N.C. 2009).

mandate in *Bowden*.[8] On October 22, 2009, however, Governor Beverly Perdue issued a statement promising that the "offenders will not be released" and publicly stated that "she would risk being thrown in jail before she authorized the inmates' release."[9] The State did not release any of the prisoners it had identified on the date of the *Bowden* mandate, or at all.

Instead, on November 10, 2009, Secretary of Correction Alvin Keller issued a memorandum directing DOC to calculate unconditional release dates for inmates sentenced under the 80-year provision—but without taking account of the sentence-reduction credits they had earned. *See* App. 107a-108a. Acknowledging that DOC—having wrongly interpreted the statute—had failed to calculate a release date for those inmates, Keller directed DOC to correct its records to reflect an unconditional release date of "80 years minus applicable jail credit," which is credit for time served while awaiting conviction and sentencing. App. 107a. Keller did not direct DOC, in calculating the inmates' unconditional release date, to apply the sentence-reduction credits inmates had earned, and DOC did not do so. Thus, the "Offender Public Information" portion of the DOC website currently lists Jones's release date as February 27, 2055.

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[8] Locke, *State Forced To Free 20 Violent Criminals*, News & Observer, Oct. 16, 2009, *available at* 2009 WLNR 20447698.

[9] Statement from the Governor Regarding Prisoner Release, *Governor Says Offenders Will Not Be Turned Loose*, Oct. 22, 2009, *available at* www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemid=727; Locke, *Perdue Will Block Inmates' Release*, News & Observer, Oct. 23, 2009, *available at* 2009 WLNR 21055443.

2. Proceedings Below. On November 18, 2009, Jones filed a petition for a writ of habeas corpus in the Superior Court of Wayne County. Jones contended that the State could not, consistent with the federal Due Process and Ex Post Facto Clauses, refuse to honor the good-time, gain-time, and merit-time credits he had been awarded, and that if his credits were honored, he would be entitled to immediate release.

At an evidentiary hearing, Secretary Keller testified that until *Bowden* held "otherwise," he and past Secretaries had believed that inmates sentenced under the 80-year provision were serving indeterminate life sentences. App. 146a. Keller stated that—consistent with DOC's treatment of prisoners serving indeterminate life sentences—DOC had awarded Jones good-time, gain-time, and merit-time credits, but only for the limited purposes of determining parole eligibility and custody grade, and for reducing Jones's sentence if the sentence were commuted to a term of years. App. 139a-140a, 147a; *see also* App. 98a-99a. In short, DOC "never considered that the[] [sentence-reduction] regulations applied to Jones or other inmates similarly situated for the purpose of calculating an unconditional release date." App. 13a. After *Bowden* rejected the State's contrary position and held that the "life" sentences imposed under the 80-year provision were sentences of a definite "term of 80 years," Keller testified that he considered the matter and decided not to apply the sentence-reduction credits awarded to Jones and others sentenced under the 80-year provision to reduce their sentences. App. 152a; *see also* App. 98-99a.

On December 14, 2009, the trial court granted Jones's petition. App. 66a. The court found that DOC had awarded Jones good time, gain time, and merit time according to the "regulations, policy, and proce-

dure the Department itself put into effect," and held that Jones, like any other inmate serving a term-of-years sentence, was entitled "to have these credits deducted from his sentence for all purposes, including the calculation of an unconditional release date." App. 63a-64a, 65a. The trial court reasoned that Jones had a liberty interest in the credits that he had earned and that DOC's "policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating an unconditional release date in the event of a gubernatorial commutation is a violation of Petitioner's [federal] due process rights." App. 64a. Finding that, in light of the credits Jones had been awarded, his sentence had expired in February 2006, the trial court ordered that Jones be immediately released. App. 65-66a.[10]

The Supreme Court of North Carolina granted review and reversed. Notably, the court agreed that, before *Bowden*, the State had interpreted the 80-year provision incorrectly: "Although DOC interpreted a life sentence imposed under that statute to be an indeterminate sentence that would expire only upon an inmate's death, this statute unambiguously defined Jones's sentence as a determinate term of imprisonment for eighty years." App. 4a. The court also acknowledged that "DOC's regulations provide for good time, gain time, and merit time to be credited against an inmate's sentence," and that Jones had accrued sufficient such credits to be released if the credits were in

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[10] The Superior Court reached the same result on Brown's petition, entering a nearly identical order on the same day. *See* App. 67a-94a.

fact used to reduce his sentence. App. 2a, 6a-7a (citing regulations).

The North Carolina court nonetheless held that the State could lawfully continue to imprison Jones, and other inmates convicted of first-degree murder and sentenced under the 80-year provision, without honoring their sentence-reduction credits. App. 15a-16a.[11] It reasoned that DOC had never used good-time, gain-time, or merit-time credits to calculate an unconditional release date for prisoners sentenced under the 80-year provision, but had treated those prisoners as serving indeterminate life sentences. App. 7a-8a. Although the court acknowledged that DOC's practice in that regard was based on a legal error, App. 4a, it nevertheless "defer[red]" to DOC's position that, under its regulations, Jones was entitled to application of his sentence-reduction credits only to determine parole eligibility and custody grade, not to reduce his sentence, App. 7a-8a.[12]

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[11] The North Carolina court did not explain why it limited its holding to inmates convicted of first-degree murder. Inmates convicted of other crimes were also sentenced to "life" under the 80-year provision, and there is no statute or regulation distinguishing among such inmates' eligibility for sentence-reduction credits on the basis of the offense committed. Nor is there any way to cabin the court's reasoning to the subgroup of prisoners serving 80-year "life" sentences for first-degree murder.

[12] Although the Supreme Court stated that it was "defer[ring] to DOC's interpretation of its regulations," App. 8a, it never explained how that "interpretation" was grounded in the regulations themselves. Indeed, it acknowledged that "DOC's regulations provide for good time, gain time, and merit time *to be credited against an inmate's sentence.*" App. 6a (emphasis added).

The North Carolina court then purported to rely on this Court's precedent in holding that Jones's continued imprisonment did not offend the Due Process Clause. It read this Court's precedents as recognizing a minimal liberty interest in sentence-reduction credits, but as permitting that interest to be balanced against the State's interest in keeping inmates in prison:

> As indicated by [*Wolff* v. *McDonnell*, 418 U.S. 539 (1974), *Hewitt* v. *Helms*, 459 U.S. 460 (1983), and *Sandin* v. *Conner*, 515 U.S. 472 (1995)], Jones's liberty interest in good time, gain time, and merit time is limited. Thus, his liberty interest, if any, in having these credits used for the purpose of calculating his date of unconditional release is de minimis ... when contrasted with the State's compelling interest in keeping inmates incarcerated until they can be released with safety to themselves and to the public.

App. 11a. The court concluded that "DOC's determination that Jones's immediate unconditional release would endanger public safety in any respect is a compelling State interest outweighing any limited due process liberty interest Jones may have in application of his good time, gain time, and merit time credits to his unconditional release." App. 12a.[13]

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[13] In fact, the State never argued that Jones's release would endanger public safety, and neither the Superior Court nor the Supreme Court made any such finding. Both Jones and Brown have long been minimum-security prisoners and have been granted community and work release without incident. *See* App. 124a-126a; App. 153a-154a.

The Supreme Court also rejected Jones's arguments under the Ex Post Facto Clause. As noted, the Supreme Court acknowledged that, prior to *Bowden*, DOC had incorrectly "interpreted a life sentence imposed under [the 80-year provision] to be an indeterminate sentence that would expire only upon an inmate's death," rather than "a determinate term of imprisonment for eighty years." App. 4a. And it was undisputed that DOC had always applied sentence-reduction credits to reduce the sentences of prisoners serving a determinate term of years. App. 141a. It was not until after *Bowden* that DOC decided to treat one particular group of inmates serving a determinate sentence differently, refusing to honor their sentence-reduction credits. The Court nonetheless concluded that "Jones has suffered no ex post facto violation" because "DOC [has not] changed its interpretation of its applicable regulations." App. 14a.[14]

Justices Timmons-Goodson and Hudson dissented. The dissent noted that it was undisputed that "DOC is, and was at all times ... obligated to treat Jones's sentence as a determinate sentence of eighty years" according to statute, and that "Jones 'has been awarded good time, gain time, and merit time credits.'" App. 25a, 26a. And it explained:

> DOC regulations involving sentence reduction credits are not minor. Whether an inmate has fully served his sentence and is entitled to release from imprisonment is a question deeply

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[14] The Supreme Court wrongly stated that "the superior court correctly found ... no ex post facto violation." App. 13a-14a. In fact, having found a due process violation, the trial court did not reach the issue.

> implicating fundamental constitutional rights. The majority asserts that Jones's liberty interest in his sentence reduction credits is "de minimis" .... The majority cites no authority for this pronouncement, which conflicts with the United States Supreme Court's decisions in *Wolff* and *Weaver*. ...
>
> Today's decision offends common notions of fundamental fairness. For thirty years, Jones has behaved well, participated in prison work release and study programs, and otherwise performed the conditions necessary to earn sentence reduction credits. Now the State refuses to grant Jones the benefit of his efforts. ... [T]he rejection of Jones's fundamental liberty interests in favor of the DOC's "interpretation" of an unwritten and heretofore unarticulated practice is a departure from established principles.... Today's decision condones spontaneous rule-making by the DOC that targets individuals retroactively, thereby abdicating this Court's role as a protector of Constitutional liberty rights.

App. 30a-31a (citation omitted).

REASONS FOR GRANTING THE WRIT

This Court has long held that a State may not, consistent with due process, arbitrarily revoke sentence-reduction credits prisoners have been awarded under state law, thus depriving them of liberty by lengthening their term of imprisonment. As this Court explained in *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974): "[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State.

The touchstone of due process is protection of the individual against arbitrary action of government."

Thus, when a State enacts a scheme rewarding good conduct with sentence-reduction credits that can be forfeited only for disciplinary violations, procedural due process requires notice of the alleged violation and an opportunity for the prisoner to be heard before the credits can be taken away. *See Wolff*, 418 U.S. at 563-566. It follows that where—as here—a State has awarded sentence-reduction credits that cannot be forfeited, or that can be forfeited only for disciplinary violations that the prisoner is not alleged to have committed, retroactive deprivation of those credits will always violate the Due Process Clause. Simply put, the State cannot arbitrarily continue to incarcerate an inmate who has fully served the sentence prescribed by law.

This Court has squarely held that such a retroactive deprivation of sentence-reduction credits also violates the Ex Post Facto Clause, which prohibits "inflict[ing] a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). If—as here—a system of sentence-reduction credits is in place when an offense is committed, later depriving the offender of credits awarded under that system amounts to lengthening the sentence to which he was subject at the time of the crime. *See Lynce* v. *Mathis*, 519 U.S. 433, 439-447 (1997); *Weaver* v. *Graham*, 450 U.S. 24, 31-36 (1981). Such a retroactive deprivation represents the very "arbitrary and potentially vindictive legislation" against which the Ex Post Facto Clause is designed to guard. *Weaver*, 450 U.S. at 29.

The North Carolina Supreme Court's decision wholly disregarded these basic principles. In rejecting

Jones's due process claim, the court first purported to "defer" to DOC's position that Jones should be treated as if he were serving an indefinite life sentence even though, as the court itself acknowledged, that position was based on an erroneous reading of the "unambiguous" governing statute. The court then read this Court's due process jurisprudence to permit the balancing of an inmate's interest in being released after fully serving his sentence against the State's general interest in public safety. That notion appears nowhere in this Court's decisions and cannot be reconciled with principles of due process. Conducting that novel balancing test, the North Carolina Supreme Court concluded that a prisoner has only a "de minimis" interest in having sentence-reduction credits honored—an interest easily outweighed by the possible benefits of keeping the prisoner incarcerated. But the interest in being free from imprisonment—absent a lawful conviction and sentence—is simply not susceptible to being casually balanced away in that manner.

The North Carolina Supreme Court similarly misapprehended this Court's Ex Post Facto Clause decisions. The court acknowledged that, before *Bowden*, DOC wrongly interpreted the governing statute as meaning that prisoners sentenced under the 80-year provision were serving an indeterminate life sentence, and that Jones and others sentenced under that provision were in fact serving a determinate 80-year sentence. The court further acknowledged that DOC's regulations permit all prisoners to earn good-time, gain-time, and merit-time credit, that DOC had always used these credits to reduce the sentences of prisoners serving terms of years, and that Jones had earned enough credits to entitle him to release if his credits were applied against his sentence. Yet it inexplicably

held that the State did not change its policy regarding sentence-reduction credits when, after *Bowden*, it announced for the first time that it would not honor sentence-reduction credits awarded to a particular group of inmates serving terms of years—those sentenced under the 80-year provision. In essence, the court treated DOC's mistaken belief that Jones and similarly situated prisoners were serving indefinite life sentences as somehow excusing its refusal to honor the sentence-reduction credits it had awarded once its mistake was recognized.

The North Carolina Supreme Court's decision in this case is an outlier. Petitioners have discovered no other decisions employing a similar analysis. That is no doubt because, as the dissent recognized, the North Carolina court strayed so far from current precedent describing and applying basic constitutional principles that restrain arbitrary government action. But this case is not merely a matter of correcting an anomalous legal error. If followed, the North Carolina court's analysis would sow confusion regarding the meaning of this Court's precedent and would seriously undermine the protections this Court has recognized for prisoners—and for others—under the Due Process and Ex Post Facto Clauses. And it will mean that Alford Jones and approximately 145 other prisoners, who have been imprisoned since the mid-1970s and have either already served or will soon have served their full sentences, will remain unlawfully incarcerated for decades after they should have been released. This Court should not permit that decision to escape review.

I. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENT UNDER THE DUE PROCESS AND EX POST FACTO CLAUSES

A. The Decision Below Contravenes This Court's Due Process Jurisprudence

The North Carolina court acknowledged all the facts that should have compelled it to conclude that Jones's continued incarceration violated due process: (1) before the decision in *Bowden*, the State had wrongly "interpreted a life sentence imposed under [the 80-year provision] to be an indeterminate sentence that would expire only upon an inmate's death," App. 4a; (2) in fact, the "statute unambiguously defined Jones's sentence as a determinate term of imprisonment for eighty years," *id.*; (3) "DOC's regulations provide for good time, gain time, and merit time to be credited against an inmate's sentence," App. 6a; (4) the regulations provided that good time could be revoked only for serious misconduct, and gain time and merit time not at all, App. 7a; and (5) "[a]s of 30 November 2009, Jones had accrued" 17,932 days of credit, App. 2a—a sufficient amount to mandate his release if "credited against [his] sentence" as the regulations direct, App. 2a, 6a-7a (citing regulations).

Yet the North Carolina court held that Jones could constitutionally be kept in prison for almost 50 more years. To reach that result, the court employed reasoning that drains the basic guarantee of due process—"protection of the individual against arbitrary action of government," *Wolff*, 418 U.S. at 558—of any real substance. And while the North Carolina court purported to apply this Court's precedent, it rendered that precedent unrecognizable in the process.

The court first observed that DOC "'has never used good time, gain time, or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment.'" App. 7a. Rather, for inmates serving indeterminate life sentences—as to which there could be no unconditional release date—DOC used the credits only to determine parole eligibility and custody grade. *Id.* Having mistakenly believed that Jones fell in that class, DOC did not calculate an unconditional release date for him; its records "reflect a release date of 'Life.'" *Id.* DOC thus conceded that Jones had earned and been awarded good-time, gain-time, and merit-time credits, but argued that Jones's credits "were not awarded to him for purposes of unconditional release," App. 8a, because DOC "never considered that these regulations applied to Jones ... for the purpose of calculating an unconditional release date," App. 13a.

Despite its previous acknowledgment that DOC's treatment of Jones as serving an indeterminate life sentence was legal error—a misreading of an "unambiguous[]" statute—the court stated that it would "defer to DOC's interpretation of its regulations." App. 8a. But an error of law is not a legitimate "interpretation." Neither the court nor DOC pointed to anything in the governing statutes or regulations supporting a distinction between inmates sentenced under the 80-year provision and other inmates with determinate sentences. Nor did the State offer a single example of an inmate serving a term of years whose sentence-reduction credits were not used to reduce his sentence. Indeed, the Secretary conceded that if Jones's Judgment and Commitment form read "80 years," or if the governor commuted his sentence to a term of 80 years, DOC

would apply the sentence-reduction credits that he had earned. App. 128a-130a, 133a.

Nonetheless, DOC contended, and the court apparently agreed, that because DOC had not understood that inmates sentenced under the 80-year provision were serving terms of years, and thus had not understood that the sentence-reduction credits those inmates were awarded would reduce their sentences, DOC should be entitled to refuse to honor those credits. App. 13a. As the dissent put it, "DOC essentially argues that because it has fundamentally misapprehended the nature of Jones's sentence for the past thirty years, it should be allowed to perpetuate its mistake." App. 25a. By purporting to "defer" to that argument, the North Carolina court merely condoned DOC's arbitrary decision, now that it has been made aware that Jones is *not* serving an indeterminate life sentence, to continue to treat him as though he were. However couched, such reasoning wrongly sanctions the deprivation of liberty without due process of law.

Indeed, the North Carolina court appeared to recognize that such so-called "deference" could not win the day. It thus purported to test DOC's actions against the requirements of this Court's due process precedents. In doing so, however, it severely distorted those precedents, reaching a result that cannot be squared with the principles this Court has established.

The North Carolina court opined that "[w]hile a prisoner retains basic constitutional rights, the Supreme Court has found that an inmate's liberty interests derived from the Fourteenth Amendment are limited, given the nature of incarceration." App. 10a (citation omitted). Thus, while recognizing that deprivation

of sentence-reduction credits implicates the Due Process Clause, the court reasoned:

> As indicated by *Wolff*, *Helms*, and *Sandin*, Jones's liberty interest in good time, gain time, and merit time is limited. Thus, his liberty interest, if any, in having those credits used for the purpose of calculating his date of unconditional release is de minimis, particularly when contrasted with the State's compelling interest in keeping inmates incarcerated until they can be released with safety to themselves and to the public.

App. 11a.

None of this Court's precedents, however, remotely supports the characterization of an inmate's interest in freedom from even a day of incarceration—let alone decades of imprisonment—as "de minimis." Nor does anything in this Court's decisions suggest that the liberty interest in retaining sentence-reduction credits awarded by the State may be balanced against the State's purported interest in continued incarceration.

To the contrary, this Court has consistently held that freedom from restraint "is the most elemental of liberty interests." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality). If a prisoner were sentenced to ten years, and the State decided to imprison him for twenty based on nothing more than a generalized notion that keeping inmates in prison longer furthers public safety, the due process violation would be obvious. When an inmate is entitled to a shortened sentence based on good-time credits granted by prison officials, refusing to honor that entitlement for no reason other than the same generalized safety concern works an identical due process violation.

This Court thus held in *Wolff* that while "the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison," where such credits are awarded by a State, an inmate's interest in those credits "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle [the inmate] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." 418 U.S. at 557. *Wolff* concluded that a prisoner accused of misconduct sufficient to warrant such a serious sanction was entitled to predeprivation written notice and a hearing at which he could call witnesses. *See id.* at 563-566. In determining what process was due under the circumstances, this Court properly took into account both the inmate's interest and the prison's interest in a safe and workable disciplinary process, *see id.* at 556, 572, balancing those interests in the same way this Court has found appropriate in other contexts, *see, e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

But *Wolff* did not suggest that one's right to freedom, even if State-created, may be considered "de minimis" or balanced away in the cavalier manner adopted by the North Carolina court. The question in *Wolff* was the minimum process due before sentence-reduction credits could be revoked for serious misconduct, not—as here—whether sentence-reduction credits that, under the State's own rules, may be revoked only for misconduct (or not at all) can nonetheless be taken away based on a State's generalized "interest in

keeping inmates incarcerated." App. 11a.[15] In fact, *Wolff* makes clear that sentence-reduction credits *cannot* be revoked in this manner: The State may rescind such credits only for the reasons specified in its existing regulations. To find otherwise drains the liberty interest created by those sentence-reduction policies of any "real substance." *Wolff*, 418 U.S. at 557. The North Carolina Supreme Court's contrary decision cannot be reconciled with this Court's precedent or with basic principles of due process.

B. The Decision Below Contravenes This Court's Ex Post Facto Jurisprudence

A law violates the Ex Post Facto Clause if it imposes "a greater punishment, than the law annexed to the crime, when committed." *Calder*, 3 U.S. (3 Dall.) at 390 (emphasis omitted).[16] This Court has long held that

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[15] *Helms* and *Sandin* provide no more support for the North Carolina court's analysis. *Helms* held that a prisoner had received all the process necessary before being placed in administrative segregation. *Hewitt* v. *Helms*, 459 U.S. 460, 472 (1983). *Sandin* reaffirmed *Wolff*'s rule that sentence-reduction credits are a protected liberty interest, but refined the Court's analysis regarding the existence of liberty interests in other "incidents of prison life" by limiting those interests to "freedom from restraint which ... imposes atypical and significant hardship on the inmate." *Sandin* v. *Conner*, 515 U.S. 472, 483-484 (1995). Both decisions focused on the amount of process required in certain disciplinary proceedings for prisoners who were legally convicted and sentenced. Neither remotely suggested that an interest in being released after *completing* one's sentence could be "*de minimis*."

[16] By its terms, the Ex Post Facto Clause applies only to legislative enactments. Yet this Court has recognized that "the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised," and that the Clause's protection should not "be evaded by the form of the

eligibility for sentence-reduction credits implicates the Ex Post Facto Clause because it is "'part of the [offender's] sentence'": It is "'one determinant of [an offender's] prison term—and ... his effective sentence is altered once this determinant is changed.'" *Lynce* v. *Mathis*, 519 U.S. 433, 445 (1997) (quoting *Weaver* v. *Graham*, 450 U.S. 24, 32 (1981)).

Determining whether a change in the law aggravates the punishment attached to the crime in contravention of the Ex Post Facto Clause is a two-part inquiry: The new rule "'must apply to events occurring before its enactment,' and it 'must disadvantage the offender affected by it.'" *Lynce*, 519 U.S. at 441. "The relevant inquiry" with respect to disadvantage is whether the challenged action has "the effect of lengthening ... [the] period of incarceration." *Id.* at 443.

Here, the North Carolina Supreme Court concluded that no ex post facto violation occurred because "DOC [had not] changed its interpretation of its applicable regulations." App. 14a. The court's own recitation of the facts, however, forecloses that conclusion. At the time of Jones's offense—and throughout his incarceration—DOC's admitted policy was to apply good-time, gain-time, and merit-time credits to reduce the sentence of all inmates serving terms of years. App. 141a. The court acknowledged that, before the decision in *Bowden*, DOC had incorrectly "interpreted a life sentence imposed under [the 80-year provision] to be an

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enactment." *Cummings* v. *Missouri*, 71 U.S. 277, 325 (1877). Accordingly, this Court has held that retroactive increases in punishment resulting from changes in administrative policies and practices may violate the Ex Post Facto Clause. *See Garner* v. *Jones*, 529 U.S. 244, 252-253 (2000).

indeterminate sentence that would expire only upon an inmate's death," when, in fact, Jones was at all times serving "a determinate term of imprisonment for eighty years." App. 4a. The State's decision, after *Bowden*, not to honor the sentence-reduction credits that Jones—an inmate serving a term of years—had earned and been awarded thus necessarily disadvantaged Jones by lengthening his sentence. Moreover, because it effectively revoked the sentence-reduction credits Jones had already earned under the regulations in place at the time of his offense and sentencing, the State's decision "was clearly retrospective." *Lynce*, 519 U.S. at 441.

The North Carolina court's contrary decision allows DOC to trade on its own legal error regarding Jones's sentence in order to evade the Ex Post Facto Clause. While the court did not elaborate on its reasoning, it presumably concluded either that Jones had never earned sentence-reduction credits because DOC's mistake of law prevented Jones from earning them, or that because DOC's present position and its prior error led to the same result, DOC had not "changed its position" regarding Jones's eligibility for sentence-reduction credits. Both conclusions are wrong for the same reason.

This Court's precedents are plain that the Ex Post Facto Clause is violated when the challenged action is "'more onerous than the prior *law*.'" *Miller* v. *Florida* 482 U.S. 423, 431 (1987) (emphasis added). The regulations in effect on the date of Jones's offense granted "allowances of time" at specified rates to "[*a*]*ll* inmate[s], including ... those with life terms." App. 177a. Consistent with the plain meaning and obvious purpose of providing "allowances of time," DOC applied those allowances to the calculation of an earlier unconditional

release date for *all* inmates who had one. App. 135a-136a. Notwithstanding DOC's mistaken belief that Jones had no "unconditional release date to which [his allowances] could be applied," App. 98a-99a, Jones, who was serving an 80-year sentence by statute, was always an inmate with an unconditional release date as a matter of law. Thus, he was eligible to earn—and did earn—sentence-reduction credits under the policies governing his sentence at the time of his offense.

When the decision in *Bowden* compelled DOC to recognize that, by statute, Jones was serving a term-of-years sentence—and not an indeterminate life sentence with no unconditional release date—DOC decided to treat Jones *as if* he were serving an indeterminate life sentence. While that decision might have been statutorily permissible if applied prospectively, "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause." *Garner* v. *Jones*, 529 U.S. 244, 253 (2000). Thus, DOC may not retroactively apply its decision to Jones, nullifying the sentence-reduction credits he has validly accrued, merely because DOC asserts that it would have promulgated regulations denying Jones such credits if it had only known the law.

Such revisionist impulses—a State's decision, after the fact, to punish a particular person or group more severely than prior law provided—are precisely what the Ex Post Facto Clause is designed to protect against. *See Miller*, 482 U.S. at 429; *Weaver*, 450 U.S. at 29; *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994) (government officials, in response to political pressures, "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals"). Here, the record reveals that Secretary Keller's memorandum, App. 107a-108a, was prompted by concerns, echoed by certain elected state

officials, about the impending release of inmates sentenced under the 80-year provision. Such concerns, whatever their validity, run afoul of the Ex Post Facto Clause where, as here, they result in action that retroactively imposes a greater punishment on a specific group.

Here, as in *Lynce*, "it is ... obvious that the retroactive change was intended to prevent the early release of prisoners convicted of murder-related offenses who had accumulated" a right to mandatory release under regulations established by law. 519 U.S. at 445. If allowed to stand, the North Carolina Supreme Court's decision permitting the State to double the sentences of 145 prisoners—simply because, in hindsight, the State wishes it had sentenced them differently—will significantly erode the Ex Post Facto Clause's protections.

II. The Reasoning Below Conflicts With Numerous Federal And State Appeals Court Decisions

The North Carolina Supreme Court's ruling is unprecedented. Other courts have specifically disapproved each of the novel elements of its reasoning, holding that a *de minimis* exception for liberty interests must be "reject[ed] out of hand," *Teague* v. *Quarterman*, 482 F.3d 769, 778 (5th Cir. 2007); that purported "deference" to administrative agencies cannot excuse retroactive alteration or unfaithful application of preexisting good-time regimes, *Smith* v. *Scott*, 223 F.3d 1191, 1195 (10th Cir. 2000); and that mistaken understandings of sentence-reduction entitlements already granted cannot permit their rescission, *Raske* v. *Martinez*, 876 F.2d 1496, 1502 (11th Cir. 1989). North Carolina is now a dramatic outlier on the question of whether States must honor sentence-reduction credits

earned and awarded under previously established regimes.

The Fifth Circuit has specifically considered whether, as the North Carolina Supreme Court held here, a deprivation of good-time credits may be disregarded as *de minimis*. It "reject[ed] out of hand the concept of a *de minimis* loss for good-time credit," along with "any exception to entitlement to due process protection," noting that any revocation of "previously-earned good-time credit[] is one in which the State's action inevitably will affect the duration of [the] sentence." *Teague*, 482 F.3d at 778, 779. Its holding was unequivocal:

> As the *de minimis* concept is contrary to Supreme Court precedent and is a Pandora's Box, the opening of which would let loose myriad difficulties and inequities, we today hold that no amount of previously earned good-time credit, however slight, can ever be deemed *de minimis* and, more importantly, that any loss of such credits that extends the inmate's expectation of release is never subject to a test for *de minimis* in the context of procedural due process.

Id. at 780. Thus, in direct contrast to the North Carolina Supreme Court, the Fifth Circuit has rejected "any exception" to the due process requirement that state prison authorities abide by their good-time regimes as they are codified, no matter the reason and no matter the number of days at stake. In North Carolina, an inmate may lose 17,932 days of credit as *de minimis* for reasons that, in Texas, would not permit the loss of even one. *See also Haygood* v. *Younger*, 769 F.2d 1350, 1356 (9th Cir. 1985) (en banc) (noting, in case involving

the miscalculation of a release date, that "[n]o one suggests that [the inmate's] five extra years in prison were *de minimis*," and that "Haygood's loss of liberty falls among the major deprivations").

The courts have also made clear that purported "deference" to agencies cannot excuse violations of the Due Process or Ex Post Facto Clauses. In *Smith*, the Tenth Circuit held that deferring to an agency's view as to whether its new interpretation altered existing rights would "enable the agency to make substantive changes in the guise of clarification." 223 F.3d at 1195. It thus held that the question whether the preexisting regulations "comport[ed] with the interpretation now urged by the []DOC," *id.* at 1196, was "a federal question we must determine for ourselves," *id.* at 1195. The court then struck down—under the Ex Post Facto Clause—the DOC's retroactive application of its new interpretation, finding it inconsistent with inmates' preexisting rights. *Id.*; *see also Ellard* v. *Alabama Bd. of Pardons & Paroles*, 824 F.2d 937, 943 (11th Cir. 1987) (DOC interpretations must comport with preexisting written provisions because "[t]he due process clause ... prohibits the states from negating by their actions rights that they have conferred by their words").

The Eleventh Circuit has further held that, even if a State misapprehends the effect of granting sentence-reduction credits, that cannot excuse retroactive attempts to revoke them. It treated as "frivolous" the argument that a State should be entitled to revoke credits granted under one part of a statute after another part of the same statute "offsetting" that grant had been found unconstitutional. *Raske*, 876 F.2d at 1502. It noted that "[t]he federal courts recognize no doctrine of 'constitutional mistake,'" and that, although

the State might have acted differently in the past had it known its error, that "by no means prevented [sentence-reduction rights] from vesting in individuals." *Id.*

Indeed, the Courts of Appeals uniformly recognize that the Due Process and Ex Post Facto Clauses resolutely protect an inmate's liberty interest in preexisting sentence-reduction schemes, without regard to the state's interest in abrogating them. For instance, in a case with facts similar to those here, the en banc Third Circuit held that an inmate had stated a claim for a due process violation where he qualified for work release under written criteria but was denied release for fear of negative public reaction or political reprisals against the prison authorities. *Winsett* v. *McGinnes*, 617 F.2d 996, 1007-1008 (3d Cir. 1980). Nor have the Courts of Appeals lightly countenanced the argument, accepted by the North Carolina court, that unwritten policies create exceptions to governing state laws or regulations so as to nullify a due process or ex post facto challenge. *See, e.g., Williams* v. *Lee*, 33 F.3d 1010, 1012-1013 & n.2 (8th Cir. 1994) (finding ex post facto violation where, before amendment, the parole board "lacked *explicit* statutory authority to revoke good time credits") (emphasis added)). Nor have they excused violations by reference to a State's interest in continued incarceration or the seriousness of the inmate's offense. *See, e.g., Plyler* v. *Moore*, 129 F.3d 728, 735 (4th Cir. 1997) (despite "the violent nature of the crimes" for which some prisoners were incarcerated, "a retroactive change in the law is violative of the Ex Post Facto Clause").

The state courts are in accord. For example, the Maryland Court of Appeals has held that its state department of corrections violated the Ex Post Facto Clause by amending its regulations regarding "double

celling." *See Secretary* v. *Demby*, 890 A.2d 310 (Md. 2006). As the Court explained:

> [T]he Secretary and Commissioner selected eligibility standards for earning double-celling credits, and then promulgated a regulation adopting those standards in order to confer the benefit of double-celling credits on inmates. At that point DOC was bound by its regulation. The DOC is now obligated to honor and follow the regulation as it is written.

Id. at 320 (quoting *Smith* v. *State*, 780 A.2d 1199, 1209 (Md. Ct. Spec. App. 2001)).

The Supreme Court of Delaware has similarly held that due process prevented its state department of corrections from giving retroactive effect to judicial interpretations of state laws regarding sentence-reduction credit that would lengthen inmates' sentences. *See Johnson* v. *State*, 472 A.2d 1311 (Del. 1983). The Delaware court recognized that, as a matter of "fundamental fairness," inmates were entitled to the benefit of sentence reduction credits they had already earned. *See id.* at 1312, 1314-1315.

These other courts recognize the basic rule—enshrined in the Due Process and Ex Post Facto Clauses—that inmates must retain their rights to sentence-reduction credits they earned or should have earned under the preexisting legal regime. Having set the rules and created a protected liberty interest in sentence-reduction credits, States may not retroactively "negat[e] by their actions rights that they have conferred by their words." *Ellard*, 824 F.2d at 943. The North Carolina Supreme Court is an outlier in rejecting this fundamental principle.

III. This Is An Exceptionally Important Case That Warrants Review Now

The decision below not only presents questions that go to the heart of the Due Process and Ex Post Facto Clauses, but, if left uncorrected, will work a tremendous injustice. Alford Jones and the approximately 145 other current inmates sentenced under the 80-year provision have all been in prison for over thirty years. Over the decades, through good behavior and productive work, they have earned good-time, gain-time, and merit-time credits under prison regulations that expressly provide that those credits will reduce their sentences. Yet now that some of those inmates have accumulated sufficient sentence-reduction credits to be entitled to release, the State has refused to honor the credits they have earned.

The State's only justification for doing so is its claim that because it did not understand that those prisoners were serving terms of years, it should be allowed to treat them as if they had been sentenced to imprisonment for their natural lives. The North Carolina Supreme Court has endorsed that reasoning. The result is that Alford Jones, who was entitled to unconditional release in 2006, will be kept in prison until 2055—that is, almost certainly until his death. Indeed, if the North Carolina court's decision stands, all but the longest-lived of the 145 affected inmates will die before they can obtain the unconditional release to which they are entitled.

The situation is thus both grave and urgent. "[S]peedy review of [a prisoner's] grievance ... is so often essential to any effective redress." *Preiser* v. *Rodriguez*, 411 U.S. 475, 494 (1973). That is especially true here, where it is undisputed that if Jones were credited

with the sentence-reduction credits he has earned, he would have completed his lawful sentence and been set free four years ago. Each additional day of unlawful incarceration works a fresh injury to Jones and to the other inmates sentenced under the 80-year provision who have completed their legal sentences. The Court should grant certiorari now and resolve the pressing and substantial constitutional questions this case presents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2010

APPENDIX

APPENDIX A

SUPREME COURT OF NORTH CAROLINA

No. 518PA09

ALFORD JONES,

Petitioner,

v.

ALVIN KELLER, Secretary of the Department of Correction, and SUSAN R. WHITE, Administrator of New Hanover Correctional Center,

Respondents.

Filed: August 27, 2010

[698 S.E.2d 49]

* * *

Justice NEWBY concurring in the result.

Justice BRADY joins in this concurring opinion.

Justice TIMMONS-GOODSON dissenting.

Justice HUDSON joins in this dissenting opinion.

[52] On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an opinion and order entered 14 December 2009 by Judge Ripley E. Rand in Superior Court, Wayne County, allowing petitioner's application for writ of habeas corpus and ordering his unconditional release from prison. Heard in the Supreme Court 16 February 2010.

* * *

EDMUNDS, Justice.

In this case we determine whether petitioner Alford Jones is entitled to habeas corpus relief from incarceration on the grounds that he has accumulated various credits against his sentence. Because we conclude that he is lawfully incarcerated, we reverse the decision of the superior court.

The record indicates that Jones was charged with the 6 January 1975 murder of William B. Turner, Sr. Jones was convicted on 19 March 1975 in Superior Court, Lenoir County, and sentenced to death. In an opinion dated 17 June 1976, this Court found no error in Jones's conviction and sentence. *State v. Jones*, 290 N.C. 292, 225 S.E.2d 549 (1976). On 1 September 1976, this Court entered an order vacating Jones's sentence of death, pursuant to the opinion of the Supreme Court of the United States in *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976). Upon remand to the superior court, Jones was sentenced to a term of life imprisonment on 27 September 1976. As of 30 November 2009, Jones had accrued good time totaling 14,041 days, gain time totaling 2,146 days, and merit time totaling 1,745 days.

On 18 November 2009, Jones filed a petition for writ of habeas corpus in Superior Court, Wayne County. Jones's contention is that, when his good time, gain time, and merit time are credited to his life sentence, which is statutorily defined as a sentence of eighty years, he is entitled to unconditional release. After careful consideration, and relying on the opinion of the Court of Appeals in *State v. Bowden*, 193 N.C. App. 597, 668 S.E.2d 107 (2008), *disc. rev. improvidently allowed*, 363 N.C. 621, 683 S.E.2d 208 (2009), the

superior court concluded that Jones was entitled to be awarded good time, gain time, and merit time by the Department of Correction (DOC) for all purposes, including calculation of Jones's date of unconditional release; that Jones had served the entirety of the sentence imposed in his case; and that Jones was entitled to relief. Accordingly, the trial court allowed Jones's petition for habeas corpus and ordered that Jones be released. This Court allowed DOC's motion for temporary stay and granted its petition for writ of certiorari.[1]

"Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint, if unlawful ...." N.C. Const. art. I, § 21 (codified at N.C.G.S. § 17-1 (2009)). Before this court, Jones again contends that he is unlawfully imprisoned because the life sentence imposed on him for first-degree murder committed in 1975 was defined as a term of eighty years and he has earned sufficient [53] credits to have completed the sentence. Accordingly, Jones argues that he is entitled to immediate unconditional release. However, the record discloses that DOC allowed credits to Jones's sentence only for limited purposes that did not include calculating an unconditional release date. We conclude that the limitations imposed by DOC on those credits are statutorily and constitutionally permissible. Therefore, his detention is lawful.

Jones is one of a group of prisoners, each of whom committed first-degree murder between 8 April 1974 and 30 June 1978 and were sentenced to life imprison-

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[1] For convenience, we will refer to respondents collectively as "DOC" rather than name the individual officers against whom the action was brought.

ment, and it is this limited group that we consider in this opinion. At the time of petitioner's offense, the controlling statute provided that "[a] sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison." N.C.G.S. § 14-2 (Cum. Supp. 1974). Although DOC interpreted a life sentence imposed under that statute to be an indeterminate sentence that would expire only upon an inmate's death, this statute unambiguously defined Jones's sentence as a determinate term of imprisonment for eighty years. *See Diaz v. Div. Of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.").

However, while section 14-2 sets the term of imprisonment, that statute is silent as to the administration of the sentence. Instead, the General Assembly delegated that responsibility to DOC. N.C.G.S. § 148-11 (Cum. Supp. 1974) ("The Secretary [of Correction] shall propose rules and regulations for the government of the State prison system, which shall become effective when approved by the Department of Correction."). The statutes further provide that "[t]he Secretary of Correction shall have control and custody of all prisoners serving sentence in the State prison system, and such prisoners shall be subject to all the rules and regulations legally adopted for the government thereof." *Id.* § 148-4 (Cum. Supp. 1974). Specifically, "[t]he rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior, the

amount of cash, clothing, etc., to be awarded prisoners after their discharge or parole." *Id.* § 148-13 (1974).

Therefore, we must next consider the legality of the pertinent DOC regulations as they apply to petitioner. DOC is an arm of the executive branch of government. *Id.* § 143B-262(a) (2009). Under the doctrine of separation of powers, this Court has long held that when an agency of another branch of government is authorized to exercise regulatory power over the administration of prison sentences, we will defer to that authority to the extent the delegation is constitutional. *See Jernigan v. State*, 279 N.C. 556, 563, 184 S.E.2d 259, 265 (1971) ("This State is firmly committed to the doctrine that '[t]he legislative, executive, and supreme judicial powers of the State Government shall be forever separate and distinct from each other.'" (quoting N.C. Const. art. I, § 6 (1970) (alteration in original))).

> "The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. The execution of the sentence belongs to a different department of the government. The manner of executing the sentence and the mitigation of punishment are determined by the legislative department, and what the Legislature has determined in that regard must be put in force and effect by administrative officers."

Id. at 563-64, 184 S.E.2d at 265 (quoting *People v. Joyce*, 246 Ill. 124, 135, 92 N.E. 607, 612 (1910)); *see also Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 853-54, *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804 (2001).

"The punishment imposed in a particular case, if within statutory limits, is within the sound discretion of the presiding judge. The prison rules and regulations respecting rewards and privileges for good conduct ('good time') are strictly administrative **[54]** and not judicial." *State v. Garris*, 265 N.C. 711, 712, 144 S.E.2d 901, 902 (1965) (per curiam) (citing N.C.G.S. § 148-13); *see also Goble v. Bounds*, 281 N.C. 307, 312, 188 S.E.2d 347, 350 (1972) (holding that a prisoner's complaint was appropriately dismissed by the superior court because questions whether the prisoner was entitled to parole, work release, or honor grade status "involve[] policy decisions which should be decided by the Department of Correction and the Board of Paroles," not the courts). Accordingly, as a general rule, the judiciary will not review the DOC's grant, forfeiture, or application of credits against a prisoner's sentence.

Nevertheless, DOC does not have carte blanche. "Of course, the responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform." *In re Appeal of Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980). Further, "[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997).

The regulations promulgated by DOC have changed several times since Jones's incarceration. Essentially, DOC's regulations provide for good time, gain time, and merit time to be credited against an inmate's sentence. *See, e.g.*, Div. of Prisons, N.C. Dep't of Corr., Policy and Procedure, ch. B, §§ .0109-.0116 (Oct. 5, 2007) (hereinafter DOC Manual); 5 NCAC 2B .0101-.0103 (Feb. 1976, Mar. 1980, Sept. 1983). Gain time and

merit time are awarded to prisoners who perform work or otherwise take some action to qualify, while good time is automatically awarded to every prisoner. *See, e.g.*, 5 NCAC 2B .0102-.0104. (Sept. 1983). Pursuant to the regulations, good time is subject to forfeiture, but only for reasons specified therein, such as major infractions, while gain time and merit time are not subject to forfeiture for misconduct. *See, e.g., id.* However, the distinctions between good time, gain time, and merit time, while of obvious importance to DOC and to inmates, are not material for our analysis as long as these credits are administered in a manner that satisfies statutory and constitutional requirements.

DOC argues, and the trial court found as fact, that "[t]he Department of Correction has never used good time, gain time, or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment." More specifically, DOC acknowledges that Jones earned gain and merit time, but states that these credits were not applied to reduce the time to be served on his sentence in any way. Accordingly, the inmate records maintained for Jones by DOC show his sentence as "99/99/99," a code that denotes a sentence of life imprisonment. These records also reflect a release date of "Life." DOC's position is that gain and merit time were only recorded in case Jones's sentence was commuted by a governor, at which time they would be applied to calculate a release date. DOC further contends that it awarded Jones good time solely for the purposes of allowing him to move to the least restrictive custody grade and to calculate his parole eligibility date, and not for the purpose of allowing Jones unconditional release. Thus, according to DOC, various types of credits were awarded to Jones for different and limited purposes only, but no

time was awarded for calculating a date of unconditional release. Because we defer to DOC's interpretation of its regulations, we need only consider whether DOC's interpretation that Jones's good time, gain time, and merit time credits were not awarded to him for purposes of unconditional release is statutorily and constitutionally permissible.

In making this determination, we first consider whether DOC's administration of good time, gain time, and merit time credits is within the statutory authority delegated it by the General Assembly. An "agency has those powers that are explicitly granted in the statute plus those powers that are ascertainable as inherent in the underlying policies of the statute, and that may be fairly implied from the statute." *In re Appeal of Cmty. Ass'n*, 300 N.C. at 280, 266 S.E.2d at 654-55 (citations omitted). At the time petitioner was sentenced, N.C.G.S. § 148-13 provided: **[55]** "The rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior ...." N.C.G.S. § 148-13 (1974).[2] In addition, at all relevant times N.C.G.S. § 143B-261 required DOC "to provide the necessary custody, supervision, and treatment to control

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[2] Although section 148-13 has been amended numerous times since petitioner was sentenced, none of these amendments limited or mandated the purposes for which credits could be used. The section's current version requires the Secretary of Correction to adopt rules specifying the rates at which and circumstances under which time may be earned, with reference to other statutes that limit the total amount by which credits can reduce a sentence. N.C.G.S. § 148-13 (2009).

and rehabilitate criminal offenders." *Id.* §§ 143B-261 (2009), 143B-261 (Cum. Supp. 1974).

Under the rationale of *In re Appeal of Cmty. Ass'n*, 300 N.C. at 280, 266 S.E.2d at 654-55, implicit in DOC's power to allow time for good behavior under section 148-13 is authority to determine the purposes for which that time is allowed. An award of time by DOC need not be an all-or-nothing award for unlimited uses. Discretion to determine the purposes for which time is awarded is consistent with such DOC goals as assuring that only those who can safely return to society are paroled or released and that they have been suitably prepared for outside life. *See* N.C.G.S. §§ 143B-261, 143B-262(a), 148-22 (2009). DOC's application of its own regulations to accomplish these ends is "strictly administrative" and outside the purview of the courts. *See Garris*, 265 N.C. at 712, 144 S.E.2d at 902. Accordingly, we conclude that DOC has acted within its statutory authority.

We now turn to the question whether DOC's interpretation and implementation of its regulations are constitutional. Jones contends that DOC has violated his rights to due process and to equal protection. In addition, he argues that he has suffered an ex post facto violation. We address each of these claims.

The United States Supreme Court has held that "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States." *Hewitt v. Helms*, 459 U.S. 460, 466, 74 L. Ed. 2d 675, 685 (1983), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418 (1995). However, "due process is flexible and calls for such procedural protections as the particular situation demands....

[N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 494 (1972). While a prisoner retains basic constitutional rights, *State v. Primes*, 314 N.C. 202, 208, 333 S.E.2d 278, 281 (1985), the Supreme Court has found that an inmate's liberty interests derived from the Fourteenth Amendment are limited, given the nature of incarceration, *Helms*, 459 U.S. at 467, 74 L. Ed. 2d at 685 ("[O]ur decisions have consistently refused to recognize more than the most basic liberty interests in prisoners."). Nevertheless, "a State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures." *Id.* at 469, 74 L. Ed. 2d at 686; *see also Sandin v. Conner*, 515 U.S. at 483-84, 132 L. Ed. 2d at 429. Prisoner benefits in the form of good time, gain time, and merit time arise from such statutes or regulations. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 41 L. Ed. 2d 935, 951 (1974) (stating that "the Constitution itself does not guarantee good time credit for satisfactory behavior while in prison ... [b]ut the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances").

The liberty interest alleged to be at issue here thus is one created by the State through its regulations. When a liberty interest **[56]** is created by a State, it follows that the State can, within reasonable and constitutional limits, control the contours of the liberty interest it creates. In other words, the liberty interest created by the State through its regulations may be limited to

those particular aspects of an inmate's incarceration that fall within the purview of those regulations. DOC has interpreted its regulations as permitting the award of different types of time credits for certain purposes and has, in fact, awarded those credits to Jones for those purposes. On the record before this Court, DOC has taken no action against Jones for punitive reasons. Because Jones has received the awards to which he is entitled for the purposes for which he is entitled, he has not been denied credits in which he has a constitutionally protected liberty interest.

Petitioner contends, however, that his credits should be applied toward calculation of the date of his unconditional release. We disagree. As indicated by *Wolff*, *Helms*, and *Sandin*, Jones's liberty interest in good time, gain time, and merit time is limited. Thus, his liberty interest, if any, in having these credits used for the purpose of calculating his date of unconditional release is de minimis, particularly when contrasted with the State's compelling interest in keeping inmates incarcerated until they can be released with safety to themselves and to the public. The record indicates that Jones is eligible for parole and has received annual parole reviews, but that the Parole Commission consistently has declined to parole him. Accordingly, Jones has received the process that is due him as an inmate eligible for parole, when the State's corresponding interest is assuring that inmates are safely released under supervision. Assuming without deciding that DOC's procedures for determining parole adequately protect an inmate's due process rights to consideration for parole, those procedures are also adequate to preserve Jones's constitutional rights while still permitting the State to withhold application of Jones's good time, gain time, and merit time to the calculation of a date for

his unconditional release. He has no State-created right to have his time credits used to calculate his eligibility for unconditional release. Jones's due process rights have not been violated.

This State interest in ensuring public safety is particularly pronounced when dealing with those convicted of first-degree murder. *See State v. Rorie*, 348 N.C. 266, 271, 500 S.E.2d 77, 80 (1998) (describing first-degree murder as "this most serious crime"), *superseded by statute, Act of May 8, 2001, ch. 81, secs. 1, 3, 2001 N.C. Sess. Laws 163, 163-65, on other grounds as recognized in State v. Defoe*, 364 N.C. 29, 691 S.E.2d 1 (2010); *see also Graham v. Florida*, __ U.S. __, __, 176 L. Ed. 2d 825, 842 (2010) (stating that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers"); *State v. Davis*, 290 N.C. 511, 548, 227 S.E.2d 97, 119-20 (1976) ("Murder in the first degree is obviously the most serious of the felonious homicides."). The State has a duty to seek to ensure public safety through the orderly release of prisoners who are both under adequate supervision and prepared for resuming life outside of confinement. *See* N.C.G.S. § 15A-1371(d) (2009) (setting forth conditions under which the Post-Release Supervision and Parole Commission may refuse to release a prisoner on parole). DOC's determination that Jones's immediate unconditional release would endanger public safety in any respect is a compelling State interest outweighing any limited due process liberty interest Jones may have in application of his good time, gain time, and merit time credits to his unconditional release.

In addressing Jones's contentions, we are aware that DOC's regulations currently define good time, gain

time, and merit time as "[t]ime credits applied to an inmate's sentence that reduce[] the amount of time to be served" and state that "[g]ood time is sentence reduction credit awarded, at the rate of one day deducted for each day served in custody for good behavior and/or without an infraction of inmate conduct rules." DOC Manual ch. B, § .0110(a), (f) (Oct. 5, 2007). These regulations were promulgated by DOC years after Jones was sentenced, *see* 5 NCAC 2B .0110(6) (Apr. 1995); *id.* 2B .0102 (Sept. 1983), when no challenge had been raised to the State's position that those sentenced [57] to life pursuant to the version of section 14-2 in effect between 8 April 1974 and 30 June 1978 had been given an indeterminate sentence. Except for this limited time period, life sentences unquestionably were and still are indeterminate sentences. No regulation explicitly provides that credits are to be used to calculate an unconditional release date, and DOC asserts that it never considered that these regulations applied to Jones or other inmates similarly situated for the purpose of calculating an unconditional release date. Because the regulations were understood to be inapplicable for that purpose, the State did not fully prepare Jones for unconditional release. In light of the compelling State interest in maintaining public safety, we conclude that these regulations do not require that DOC apply time credits for purposes of unconditional release to those who committed first-degree murder during the 8 April 1974 through 30 June 1978 time frame and were sentenced to life imprisonment.

We next consider Jones's ex post facto argument. He contends that DOC's interpretation of its regulations has retroactively increased the punishment for his offense after the offense was committed. The trial court concluded that failing to use good time, gain time,

and merit time credits to calculate an unconditional release date for Jones was not an ex post facto violation.

The constitutions of both the United States and North Carolina prohibit the enactment of ex post facto laws. U.S. Const. art. I, § 10, cl. 1 ("No state shall ... pass any ... ex post facto law ...."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). The federal and North Carolina constitutional ex post facto provisions are analyzed "under the same definition." *State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Most pertinently here, the ex post facto prohibition applies to: "'Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed.'" *Id.* (quoting *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39 (1990) (quoting *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798))).

Legislation that retroactively alters sentence reduction credits in effect at the time a crime was committed can be an unconstitutional ex post facto law. *See Weaver v. Graham*, 450 U.S. 24, 25, 36, 67 L. Ed. 2d 17, 20-21, 28 (1981) (finding an ex post facto violation in Florida legislation that altered the availability of good time sentence reduction from a convicted prisoner's sentence). However, Jones does not allege that any legislation or regulation has altered the award of sentence reduction credits. Nor has DOC changed its interpretation of its applicable regulations. Accordingly, the superior court correctly found that Jones has suffered no ex post facto violation.

Finally, Jones argues that DOC's denial of good time, gain time, and merit time for the purpose of calculating an unconditional release date violates his right to equal protection of the law. Jones contends that his equal protection right prohibits the State from treating inmates who committed first-degree murder between 8 April 1974 and 30 June 1978 and were sentenced to life imprisonment under N.C.G.S. § 14-2, who are thus serving determinate sentences, differently from other inmates serving determinate sentences. "When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied." *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983); *see also Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 270 (1993). Thus, "equal protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of crime unless it prescribes different punishment for the same acts committed under the same circumstances by persons in like situation." [58] *State v. Benton*, 276 N.C. 641, 660, 174 S.E.2d 793, 805 (1970), *quoted in State v. Dunlap*, 298 N.C. 725, 735-36, 259 S.E.2d 893, 899 (1979).

Jones was convicted of a different crime than others serving determinate sentences under statutes other than N.C.G.S. § 14-2, even if the sentences of some of those others are for eighty years or even longer (perhaps due to the imposition of consecutive sentences). The fact that Jones is serving a sentence for first-degree murder reasonably suggests that he presents a greater threat to society than prisoners convicted of other offenses. Thus, DOC has a rational basis for de-

nying petitioner good time, gain time, and merit time for the purposes of unconditional release, even though these same credits have been awarded for that purpose to other prisoners with determinate sentences.

Accordingly, we hold that Jones is legally incarcerated. The holding of the trial court to the contrary is reversed.

REVERSED.

Justice NEWBY concurring in the result.

The question at the heart of this appeal is whether the General Assembly intended to eliminate life sentences by legislation enacted in 1974. A thorough analysis of that legislation reveals that the General Assembly never abolished life sentences. In fact, the legislature exhibited an affirmative intent to retain life imprisonment as a special sentence status. Because the administration of the relevant statutory mandates by the Department of Correction ("DOC") has been in consistent harmony with this legislative intent and with inmates' constitutional rights, it is not the place of the courts to overturn DOC's policy of treating life inmates differently from other prisoners.

I agree with the majority's ultimate holding that Jones is lawfully incarcerated. More specifically, I concur in the conclusion that DOC has acted in accordance with its statutory grant of authority, and I agree further that Jones does not have any due process liberty interest in having his good time, gain time, or merit time credits applied to his sentence for purposes of calculating an unconditional release date. I write separately to express my belief that this latter conclusion is true for all inmates sentenced to life imprisonment for crimes committed between 8 April 1974 and 30 June

1978. I also write to provide a broader response to Jones's contention that his continued incarceration represents a violation of his right to equal protection of the laws.

As noted by the majority, the trial court found as fact that "[t]he Department of Correction has never used good time, gain time, or merit time credits in the calculation of unconditional release dates *for inmates who received sentences of life imprisonment.*" (Emphasis added.) This finding was based on competent testimony from respondent Alvin Keller, Secretary of DOC, and from Teresa O'Brien, an employee in DOC's Combined Records Section.[3] "[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if ... there is evidence to the contrary." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (alterations in original) (citations and internal quotation marks omitted). Thus, this Court is bound by the finding that DOC has never applied good time, gain time, or merit time credits to calculate an unconditional release date for any inmate sentenced to life imprisonment.

Moreover, the majority correctly concludes that neither the General Statutes nor DOC's regulations

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[3] Respondent Keller testified that DOC's regulations have "never been understood to require awards of gain time towards unconditional release of inmates with life sentences" and that "good and gain time credits have never been applied to calculate an unconditional release date for any inmate with a life sentence imposed for a crime committed before 1 July 1981, which includes the *Bowden* group of inmates." Ms. O'Brien testified: "Good behavior credits, which include good, gain, and merit time, have never been applied to life sentences in order to calculate an expiration or unconditional release date."

give Jones any right to have his time credits applied for purposes of unconditional release. In general, we accord significant deference to the manner in which a statute is interpreted by the executive agency charged with enforcing it, [59] *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citation omitted), and we give *controlling* weight to an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation[s]," *Morrell v. Flaherty*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994) (citations and internal quotation marks omitted), *cert. denied*, 515 U.S. 1122, 115 S. Ct. 2278, 132 L. Ed. 2d 282 (1995). DOC has never read the relevant statutes and regulations as requiring application of time credits to calculate unconditional release dates for life inmates. Given that those statutes and regulations make no attempt to set forth the specific purposes for which time credits are to be applied, DOC's interpretations are reasonable and worthy of deference so long as they are constitutionally sound.

Jones contends that he has a due process liberty interest in having his good time, gain time, and merit time credits applied for unconditional release purposes. However, as demonstrated above, the relevant statutes and regulations do not give inmates sentenced to life imprisonment any such right, nor has DOC vested life inmates with such a right through its manner of administering those statutes and regulations. Thus, life inmates like Jones can claim no liberty interest in having time credits applied to calculate their unconditional release dates.

Jones argues further: "The unequal treatment of Mr. Jones' sentence, *and that of other inmates in the* Bowden-*class*, amounts to a classic violation of equal

protection laws." (Emphasis added.) The "*Bowden*-class" of inmates to which Jones refers is the group of inmates sentenced to life imprisonment for crimes committed between 8 April 1974 and 30 June 1978. Jones goes on to contend that "[his] *life sentence* is identical to a term of 80-years." (Emphasis added.) In other words, Jones argues that life sentences imposed under the 1974 version of section 14-2 are indistinguishable from ordinary term-of-years sentences and that DOC has, therefore, violated equal protection by treating his class of life inmates differently from term-of-years inmates. While I do not disagree with the majority's equal protection analysis, I believe there is a more direct way to respond to Jones's precise argument.

Jones's contention that his class of life inmates is no different from term-of-years inmates ignores the fact that section 14-2 does not abolish life sentences or render them indistinguishable from ordinary term-of-years sentences. Rather, in providing a definition for "[a] sentence of life imprisonment," section 14-2 explicitly retains life imprisonment as a special sentence status. N.C.G.S. § 14-2 (Cum. Supp. 1974). Moreover, the session law that gave rise to section 14-2 utilizes the sentence status of life imprisonment eight times, Act of Apr. 8, 1974, ch. 1201, 1973 N.C. Sess. Laws 323, and in six of those instances the General Assembly set forth the life sentence as an available punishment for a specific crime, *id.*, secs. 1-4, 7, at 323-24. This continued use of the distinct sentence status of life imprisonment is hardly the manner in which one would expect the legislature to abolish life sentences or convert them to term-of-years sentences for all purposes.

Based on the General Assembly's intent to continue distinguishing life sentences (even those with an un-

conditional release date of eighty years) from term-of-years sentences, Jones is similarly situated to other life inmates, not to term-of-years inmates. As the trial court found, DOC has never used time credits to calculate unconditional release dates for inmates sentenced to life imprisonment. Thus, DOC has not subjected Jones to disparate treatment in comparison with other similarly situated inmates. Jones and other inmates sentenced to life imprisonment have been treated differently from ordinary term-of-years in-mates, but the Supreme Court of the United States has said that if a law involving disparate treatment does not infringe upon a fundamental right or target a suspect class, the classification is permissible as long as it bears a rational relation to some legitimate end. *Heller v. Doe*, 509 U.S. 312, 319-20, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257, 270 (1993) (citations omitted). Jones has not demonstrated any right, let alone a fundamental right, to have his time credits applied to his sentence for all possible purposes, nor has he shown that inmates sentenced to life imprisonment are a suspect class. Because DOC's disparate treatment **[60]** of life inmates relative to term-of-years inmates is rationally related to the legitimate State ends of punishing heinous crimes with greater severity and ensuring public safety, Jones's equal protection claim fails.

Having stated the foregoing, I concur in the result of the majority's opinion.

Justice BRADY joins in this concurring opinion.

Justice TIMMONS-GOODSON dissenting.

The rule of law, consistency, and fundamental fairness are not advanced by today's decision allowing the Department of Correction (DOC) to withhold inmate

Alford Jones's accumulated sentence reduction credits. This decision violates the DOC's own regulations and policies, Jones's constitutional rights, and the doctrine of separation of powers. And by doing so, I fear that a cornerstone of our legal system, the writ of habeas corpus, is devalued. The undisputed record reflects that Jones has fully served his term of imprisonment and is thereby entitled to immediate unconditional release. The decision to the contrary offends all notions of fundamental fairness. I therefore respectfully dissent.

This case arises out of a mistake of law by the DOC that it now seeks to rectify through unwritten, retrospective policy pronouncements some thirty-five years after the fact. The DOC says the department believed that the "life" sentence imposed upon Jones was a sentence of natural life rather than the eighty-year sentence he was actually serving. The DOC awarded Jones sentence reduction credits but putatively believed that those credits would only shorten Jones's sentence in the event of a commutation by the governor. Expecting that the sentence reduction credits earned by Jones would never be utilized, the DOC continued to award Jones sentence reduction credits pursuant to DOC policies and regulations without placing any limitations upon the use of such credits.

This Court's 1978 decisions in *State v. Richardson* and *State v. Williams* cast doubt on the grounds upon which the DOC based its belief that N.C.G.S. § 14-2 meant natural life rather than a determinate eighty-year sentence. The nature and timing of the decisions put the DOC on notice that sentence reduction credits for Jones should diminish his eighty-year sentence. In Richardson, this court determined that "'a sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years'" and that pre-

conviction incarceration credits should be applied to reduce the defendant's 100 year sentence, which included an eighty-year life sentence. *State v. Richardson*, 295 N.C. 309, 318-20, 245 S.E.2d 754, 760-61 (1978). Similarly, in *Williams*, this Court upheld the defendant's sentence of 300 years in prison, which was comprised in part by three consecutive eighty-year life sentences. *State v. Williams*, 295 N.C. 655, 679-80, 249 S.E.2d 709, 725 (1978). In neither case did the State, under which the DOC's interests are represented, argue that the proper interpretation of a life sentence under section 14-2 is natural life.

Despite our decisions in *Richardson* and *Williams*, it was only after inmate Bobby Bowden filed a writ of habeas corpus—contesting the lawfulness of his continued incarceration and requesting immediate release from his sentence—that the DOC altered the nature of the sentence reduction credits awarded to Jones, Bowden, and other similarly situated inmates. *See State v. Bowden*, 193 N.C. App. 597, 598, 668 S.E.2d 107, 108 (2008), *disc. rev. improvidently allowed*, 363 N.C. 621, 683 S.E.2d 208 (2009). Specifically, the Court of Appeals observed that the DOC's records for Bowden initially "indicated that all of [his] good conduct time, merit time, and gain time credits had been applied to his sentence." *Id.* at 598, 668 S.E.2d at 108. Curiously, and "for reasons unclear to [the Court of Appeals], the Department of Correction later retroactively changed the status of [Bowden's] sentence reduction credits from 'applied' to 'pending.'" *Id.* Subsequent statements of policy by the DOC and other executive branch officials also cut against the letter of the DOC's regulations for awarding sentence reduction credits.

The question for this Court is therefore whether the DOC may now legally withhold the credits it has

awarded Jones. In order to answer this question, I first examine the [61] nature of Jones's interest in his sentence reduction credits.

The United States Supreme Court has explained that, although an inmate's "rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 41 L. Ed. 2d 935, 950 (1974); *see also State v. Primes*, 314 N.C. 202, 208, 333 S.E.2d 278, 281 (1985) (stating that "basic constitutional rights adhere inside as well as outside the prison walls" (citations omitted)); *Goble v. Bounds*, 281 N.C. 307, 311, 188 S.E.2d 347, 349 (1972) (affirming that "a prisoner takes with him into the prison certain rights which may not be denied him") (citing *Lee v. Washington*, 390 U.S. 333, 19 L. Ed. 2d 1212 (1968) (per curiam)). Prisoners "may not be deprived of life, liberty, or property without due process of law." *Wolff*, 418 U.S. at 556, 41 L. Ed. 2d at 951 (citations omitted). The United States Supreme Court has specifically recognized that prisoners have a protected liberty interest in avoiding the withdrawal of sentence reduction credits awarded pursuant to state laws or policies. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221, 162 L. Ed. 2d 174, 189 (2005) (noting that a prisoner's liberty interest "may arise from an expectation or interest created by state laws or policies" and that prisoners have a "liberty interest in avoiding withdrawal of [a] state-created system of good-time credits" (citing *Wolff*, 418 U.S. at 556-58, 41 L. Ed. 2d at 950-51)); *Weaver v. Graham*, 450 U.S. 24, 25, 35-36, 67 L. Ed. 2d 17, 20-21, 27-28 (1981) (determining that a statutory alteration reducing the availability of gain

time for inmates' good conduct violated the prohibition against ex post facto laws and was therefore unconstitutional). Thus, when the State creates "a right to a shortened prison sentence through the accumulation of credits for good behavior," the prisoner has a cognizable liberty interest in the credits that cannot be "arbitrarily abrogated." *Wolff*, 418 U.S. at 557, 41 L. Ed. 2d at 951.

In the instant case the General Assembly authorized prison rules and regulations granting "rewards and privileges" to inmates "as an inducement to good conduct." N.C.G.S. § 148-13 (1974). The General Assembly thereby delegated to the Secretary of Correction the authority to promulgate regulations granting sentence reduction credits. At all relevant times, the statutory authorization to issue regulations has been the only means by which the Secretary of Correction could exercise discretion regarding sentence reduction credits. Accordingly, the Secretary of Correction promulgated regulations awarding good, gain, and merit time to inmates, including Jones, provided the inmates behaved and participated in the requisite programs. In the years since then, Jones has continued to earn sentence reduction credits pursuant to DOC regulations, policies, and procedures. Jones therefore has a protected liberty interest in the sentence reduction credits which were created and awarded to him by the State, through the Secretary of Correction, pursuant to State-created policies, procedures and regulations, that cannot be "arbitrarily abrogated." *Wolff*, 418 U.S. at 557, 41 L. Ed. 2d at 951.

Indeed, at oral argument counsel for the DOC agreed that if sentence reduction credits were in fact "awarded" to Jones, he would have a corresponding liberty interest in those credits under *Wolff* that could not

be denied absent procedural due process. However, counsel for the DOC denied that the sentence reduction credits had been awarded to Jones, asserting instead that the credits had only been "stored." This assertion flatly contradicts the trial court's finding that Jones "has been awarded good time, gain time, and merit time credits by the Department of Correction based on his conduct and his participation in the [work release and other related] programs." The DOC has not challenged any of the trial court's findings of fact and these findings are therefore binding.

Having determined that Jones has a protected liberty interest in the sentence reduction credits awarded him pursuant to State-created regulations and policies, I now consider whether the DOC may legally withhold the sentence reduction credits earned by **[62]** Jones. The DOC essentially argues that because it has fundamentally misapprehended the nature of Jones's sentence for the past thirty years, it should be allowed to perpetuate its mistake and retroactively eliminate the sentence reduction credits awarded to Jones. This argument flies in the face of bedrock principles securing fundamental fairness in the criminal justice system, including due process and the prohibition against *ex post facto* laws.

As the majority explains, United States Supreme Court has recognized that a prisoner's liberty interest is constitutionally protected by procedural due process when that liberty interest is created by the State. *Wolff*, 418 U.S. at 555-58, 41 L. Ed. at 950-52. The Court held in *Wolff* that a prisoner's liberty interest "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to in-

sure that the State-created right is not arbitrarily abrogated." *Id.* at 557, 41 L. Ed. at 951. Accordingly, Jones's liberty interest in the sentence reduction credits cannot be diminished by the DOC without giving an adequate level of process. Yet the DOC provided no process whatsoever before attempting to change the applicability of Jones's good time, gain time, and merit time credits. The majority effectively concedes that some process is due by suggesting that the parole process is sufficient. However, the opinion leaves unexplained how the discretionary review of parole is relevant in a discussion of sentence reduction credits, a constitutionally protected interest. In the end, by providing no process prior to withholding Jones's sentence reduction credits, the DOC violated Jones's constitutional right to procedural due process.

Moreover, the DOC has no authority to impose a term of imprisonment other than the sentence handed down by the trial court. *See State v. Allen*, 346 N.C. 731, 737, 488 S.E.2d 188, 191 (1997) (stating that "[t]his Court has already settled that the General Assembly alone prescribes the maximum and minimum punishment which can be imposed on those convicted of crimes" (citation omitted)). The trial court sentenced Jones to a term of life imprisonment, which at the time was defined as a term of eighty years. The DOC is, and was at all times, therefore obligated to treat Jones's sentence as a determinate sentence of eighty years. To do otherwise violates the doctrine of separation of powers. *See Jernigan v. State*, 279 N.C. 556, 564, 184 S.E.2d 259, 265 (1971) ("'The manner of executing the sentence and the mitigation of punishment are determined by the legislative department, and what the Legislature has determined in that regard must be put in force and effect by administrative officers.'" (quoting

People v. Joyce, 246 Ill. 124, 135, 92 N.E. 607, 612 (1910))). By defining a life sentence as eighty years, the General Assembly intended Jones to serve an eighty-year determinate sentence. As an inmate serving an eighty-year determinate sentence, like other inmates serving determinate sentences, Jones was entitled under DOC regulations and policies to earn sentence reduction credits for the purpose of shortening his sentence. The DOC's refusal to recognize the sentence reduction credits awarded to Jones ignores the will and intent of the General Assembly in defining a life sentence as eighty years and in enacting legislation authorizing sentence reduction credits. I would therefore hold that the DOC is without authority to withhold the sentence reduction credits it awarded to Jones.

The majority concludes, however, that Jones is not entitled to the benefit of the sentence reduction credits he has earned. I note that the majority accepts the following facts: (1) Jones was sentenced to a determinate term of imprisonment of eighty years. (2) While incarcerated, Jones earned good time, gain time, and merit time credits (sentence reduction credits) pursuant to DOC regulations and policies. (3) As of 30 November 2009, Jones's good time credit totaled 14,041 days; his gain time credits totaled 2146 days; and his merit time credit totaled 1745 days. (4) Under DOC regulations and policies, gain time credits and merit time credits are not subject to forfeiture. (5) Good time credits may be forfeited, but only for reasons specified in the DOC regulations, such as major infractions. (6) Under DOC **[63]** regulations, good time, gain time, and merit time credits operate to reduce the length of an inmate's sentence. (7) The DOC regulations do not specify or limit the purposes for which sentence reduction credits are awarded.

Despite acknowledgment of these facts, the decision countenances the DOC's retrospective and unreasonable interpretation of its regulations, thereby abdicating the judiciary's solemn duty to check arbitrary acts by the other branches. *See Long v. Watts*, 183 N.C. 99, 113, 110 S.E. 765, 768 (1922) (stating that an independent judiciary must be secure against, *inter alia*, "the arbitrary authority of the administrative heads of government"). In addition, the majority fails to recognize that the DOC's position is not based upon any "interpretation" of its regulations. Rather, the DOC's position contravenes the regulations themselves. Nothing in any relevant provision of the North Carolina General Statutes, the North Carolina Administrative Code, the DOC's policies, procedures, or regulations, or North Carolina case law precedent specifically authorizes the Secretary of Correction to apply the good time, gain time, merit time, or any other awarded credits only for certain purposes and not for others. Simply put, the DOC offers no textual support for its position and neither does the majority.

To the contrary, the DOC plainly sets forth the procedures by which Jones has earned sentence reduction credits. DOC policies and procedures establish "the rules and methods for computing sentence reduction credits in the form of Good Time for satisfactory behavior, Gain and Earned Time for participation in work or program assignments, and Meritorious Time for exemplary acts or for working under emergency conditions, and working overtime or for program achievement." Div. of Prisons, N.C. Dep't of Corr., Policy and Procedures ch. B, § .0109 (Oct. 5, 2007). The DOC defines "Sentence Reduction Credits" as "[t]ime credits applied to an inmate's sentence that reduces the amount of time to be served. These credits are called

Good Time, Gain Time, Earned Time and Meritorious Time." *Id.*, § .0110(f). The provisions do not exclude Jones from earning sentence reduction credits. Notably, the DOC specifically excludes seven categories of inmates from earning good time and gain time, *id.*, §§ .0111(d), .0112(c), yet no exception applies to inmates that received life sentences for offenses committed between 8 April 1974 and 30 June 1978. Nevertheless, the majority now attempts to create and to apply an ad hoc exception to Jones. The DOC's position unjustifiably requires this Court to read into the applicable provisions limitations that are noticeably absent and that run counter to the plain and unambiguous language of the provisions. *See Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) ("When the language of regulations is clear and unambiguous, there is no room for judicial construction, and courts must give the regulations their plain meaning."). Because there is no support for the DOC's position in the written regulations and policies—and with all support being to the contrary—the DOC presents no "interpretation of its regulations" to which this Court may defer.

Despite the lack of textual support for the DOC's position, the majority nonetheless reasons that the DOC has "implicit authority" to determine the purposes for which sentence reduction credits may be awarded and posits that "an award of time by [the] DOC need not be an all-or-nothing award for unlimited uses." I agree that the Secretary of Correction is fully authorized to "issue regulations" and "adopt rules" limiting the purposes for which sentence reduction credits may be applied. N.C.G.S. § 148-13 (2009). However, the Secretary of Correction has not done so in this case. Instead, the Secretary has issued policies, procedures,

and regulations regarding the award of sentence reduction credits, under which Jones accrued credits for good time, gain time, and merit time based on his participation in work, study, and other programs. The DOC concedes that the Secretary's discretion is exercised through the DOC regulations. These provisions and regulations do not permit the Secretary to withhold or withdraw the sentence reduction credits already awarded to Jones, nor do they limit the purposes for which the credits may be applied. And while the DOC **[64]** need not issue a regulation or rule for every minor detail of prison administration and must be allowed a certain degree of flexibility in interpreting its rules, the DOC, should it desire to limit the purposes for which sentence reduction credits may be applied, must articulate these limitations in the form of written rules, regulations, or policies.

DOC regulations involving sentence reduction credits are not minor. Whether an inmate has fully served his sentence and is entitled to release from imprisonment is a question deeply implicating fundamental constitutional rights. *See Wolff*, 418 U.S. at 555-58, 41 L. Ed. 2d at 950-52. The majority asserts that Jones's liberty interest in his sentence reduction credits is "de minimis" and that the State may "control the contours of the liberty interest it creates." The majority cites no authority for this pronouncement, which conflicts with the United States Supreme Court's decisions in *Wolff* and *Weaver*. Accordingly, this Court should reject the DOC's unwritten, retrospective "interpretation," which is contrary to Jones's liberty interest and the unambiguous letter of the relevant regulations and statutes.

Jones does not challenge the DOC's authority to formulate rules and regulations. He asks only that the

DOC abide by them. This Court has recognized that an inmate may "earn" a "right to honor grade status" and is "'entitled'" to release after "'full service of his sentence *less good time earned* during incarceration.'" *Goble*, 281 N.C. at 311, 188 S.E.2d at 349-50 (emphasis added) (quoting *Menechino v. Oswald*, 430 F.2d 403, 408 (1970), *cert. denied*, 400 U.S. 1023, 27 L. Ed. 2d 635 (1971)). Jones has earned his sentence reduction credits in accordance with DOC policies and regulations and is now entitled to release. I do not believe that a decision by this Court requiring the DOC to follow its own policies and procedures—which the Secretary of Correction is free to alter at any time—usurps or interferes with the power or authority of the DOC.

Today's decision offends common notions of fundamental fairness. For thirty years, Jones has behaved well, participated in prison work release and study programs, and otherwise performed the conditions necessary to earn sentence reduction credits. Now the State refuses to grant Jones the benefit of his efforts. And although the majority claims the DOC does not have "carte blanche" over the administration of prisoners' sentences, the rejection of Jones's fundamental liberty interests in favor of the DOC's "interpretation" of an unwritten and heretofore unarticulated practice is a departure from established principles. One wonders what other unwritten policies the DOC operates under and whether they, too, are supported by law. Today's decision condones spontaneous rule-making by the DOC that targets individuals retroactively, thereby abdicating this Court's role as a protector of Constitutional liberty rights.

This is a hard case. The lives of the victim and his family have been forever changed by Jones's criminal conduct. Public attention has been excited by the pos-

sibility of release of those previously committed to life sentences. The late United States Supreme Court Justice Oliver Wendell Holmes appropriately cautioned against allowing "immediate interests [to] exercise a kind of hydraulic pressure which makes what was previously clear seem doubtful, and before which even well settled principles of law will bend." *N. Securities Co. v. U.S.*, 193 U.S. 197, 400-01, 48 L. Ed. 679, 726 (1904) (Holmes, J., dissenting). Many would argue that the breaking point has been reached in this case.

Because withholding Jones's accumulated sentence reduction credits condones spontaneous rule-making by the DOC and violates the DOC's own regulations, Jones's constitutional rights, and the doctrine of separation of powers, I would affirm the order of the trial court allowing Jones's petition for writ of habeas corpus.

Justice HUDSON joins in this dissenting opinion.

APPENDIX B

IN THE SUPREME COURT
OF NORTH CAROLINA

518PA09	Jones v Keller	Wayne

ALFORD JONES,
Petitioner,

v

ALVIN KELLER, Secretary of the Department of Correction, and SUSAN R. WHITE, Administrator of New Hanover Correctional Center,
Respondents

From NC Court of Appeals
(P09-977)
From Lenoir
(75CRS1032)
From Wayne
(09CRS8633)

JUDGMENT

This cause came on to be argued upon the transcript of the record from the North Carolina Court of Appeals. Upon consideration whereof, this Court is of the opinion that there is error in the record and proceedings of said Court of Appeals.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered

by the Honorable Robert H. Edmunds, Jr., Associate Justice, be certified to the said North Carolina Court of Appeals to the intent that the judgment of the Court of Appeals is Reversed.

And it is considered and adjudged further, that the Petitioner do pay the costs of the appeal in this Court incurred, to wit, the sum of One Thousand Two Hundred and Nine and 50/100 ($1209.50), and execution issue therefor.

Certified to the North Carolina Court of Appeals, this the 16th day of September 2010.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

By: /s/ [illegible]
Assistant Clerk

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A TRUE COPY
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
By: /s/ [illegible]
ASSISTANT CLERK

September 22, 2010

APPENDIX C

SUPREME COURT OF NORTH CAROLINA

No. 517PA09

FAYE B. BROWN,

Petitioner,

v.

THE NORTH CAROLINA DEPARTMENT OF CORRECTION; ALVIN KELLER, in his capacity as Secretary of the Department of Correction; and KENNETH ROYSTER, in his capacity as Superintendent of Raleigh Correctional Center for Women,

Respondents.

Filed: August 27, 2010

[697 S.E.2d 327]

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an opinion and order entered 14 December 2009 by Judge Ripley E. Rand in Superior Court, Wake County, allowing petitioner's application for writ of habeas corpus and ordering her unconditional release from prison. Heard in the Supreme Court 16 February 2010.

* * *

PER CURIAM.

For the reasons stated in *Jones v. Keller*, __ N.C. __, __ S.E.2d __ (2010) (518PA09), we reverse the trial

court's 14 December 2009 order allowing petitioner's petition for writ of habeas corpus.

REVERSED.

Justices BRADY and NEWBY concur in the result for the reasons states in the concurring opinion in *Jones v. Keller*, __ N.C. __, __ S.E.2d __ (2010) (518PA09).

Justices TIMMONS-GOODSON and HUDSON dissent for the reasons stated in the dissenting opinion in *Jones v. Keller*, __ N.C. __, __ S.E.2d __ (2010) (518PA09).

APPENDIX D

IN THE SUPREME COURT
OF NORTH CAROLINA

517PA09	Brown v N. C. Dept. of Correction, et al	Wake

FAYE B. BROWN,
Petitioner,

v

THE NORTH CAROLINA
DEPARTMENT OF CORRECTION,
ALVIN KELLER, in his capacity as
Secretary of the Department of
Correction, and KENNETH ROYSTER,
in his capacity as Superintendent of
Raleigh Correctional Center for Women,
Respondents

From NC Court of Appeals
(P09-978)
From Martin
(75CR3812)
From Wake
(09CVS23746)

JUDGMENT

This cause came on to be argued upon the transcript of the record from the North Carolina Court of Appeals. Upon consideration whereof, this Court is of the opinion that there is error in the record and proceedings of said Court of Appeals.

It is therefore considered and adjudged by the Court here that the opinion of the Court be certified to the said North Carolina Court of Appeals to the intent that the judgment of the Court of Appeals is Reversed.

And it is considered and adjudged further, that the Petitioner do pay the costs of the appeal in this Court incurred, to wit, the sum of One Thousand and Fifty-Nine and 00/100 ($1059.00), and execution issue therefor.

Certified to the North Carolina Court of Appeals, this the 16th day of September 2010.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

By: /s/ [illegible]
Assistant Clerk

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[seal]

A TRUE COPY
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
By: /s/ [illegible]
ASSISTANT CLERK

September 22, 2010

APPENDIX E

STATE OF NORTH CAROLINA COUNTY OF WAYNE		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
ALFORD JONES, Petitioner, v. ALVIN KELLER, Secretary of the Department of Correction, and SUSAN R. WHITE, Administrator of New Hanover Correctional Center, Respondents.	)	File No. 09CRS8633 (replacing File No. 09R226) (related to Lenoir County File No. 75CR1032)[1]

stamps:
CERTIFIED A TRUE COPY
/s/ [illegible]
CLERK OF SUPERIOR COURT

[1] Although Petitioner's sentence was imposed in Lenoir County, the undersigned judge as presiding in Wayne County Superior Court does have the requisite jurisdiction and appropriate venue to address the matters presented in the Petition. *See* N.C. Gen. Stat. § 17-6 ("Application for the writ shall be made in writing, signed by the applicant ... [t]o any one of the superior court judges, either during a session or in vacation."); *see also, e.g., McEachern v. McEachern*, 210 N.C. 98, 102 (1936) ("[A]ny judge, anywhere, has the power to issue the writ ....").

FILED
2009 DEC 14 AM 8:07
WAYNE COUNTY C.S.C.
BY /s/ [illegible]

MEMORANDUM OPINION AND ORDER

This matter comes before this Court on Alford Jones's Petition for Writ of Habeas Corpus filed November 18, 2009. The Court held a hearing on this Petition on December 9, 2009. Present at the hearing were Alford Jones, Petitioner; Glenn Barfield, Esq., Sarah Jessica Farber, Esq., and Emily Coward, Esq., counsel for Petitioner; and Tiare Smiley, Esq., and Elizabeth Parsons, Esq., counsel for Respondents. The Court has considered the record proper in this case, including the evidence presented at the hearing, the arguments and submissions of both sides, and a full review of the Lenoir County court file related to the Petition filed in this case, including the North Carolina Supreme Court's decision addressing Petitioner's direct appeal in this case, *see State v. Jones*, 290 N.C. 292 (1976).

The Court notes for the record that the North Carolina Advocates for Justice moved for Leave to File an *Amicus Curiae* Brief in this matter. The Court has considered this Motion and finds that it has merit. Accordingly, the Motion of the North Carolina Advocates for Justice for Leave to File an *Amicus Curiae* Brief in this matter is ALLOWED, and the Court will consider the Brief as it relates to the issues presented in this case.

[2]

Based on the consideration of the record proper as noted above, the Court makes the following Statement

of Governing Law, Findings of Fact, and Conclusions of Law.

STATEMENT OF GOVERNING LAW

1. The relevant North Carolina sentencing regime for the purposes of this Order is best described as the "pre-Fair Sentencing" regime. Under pre-Fair Sentencing, crimes were divided up into either felonies or misdemeanors. There were no individual classes of offense as have been provided for in Fair Sentencing and Structured Sentencing.

Punishment for First Degree Murder

2. At the time that Petitioner's trial took place, first degree murder was punishable exclusively by the death penalty. *See* N.C. Gen. Stat. § 14-17 (Cum. Supp. 1975); 1973 N.C. Sess. Laws, ch. 1201, s.1;[2] *see also State v. Niccum*, 293 N.C. 276, 282-83 (1977). In reviewing North Carolina's capital sentencing regime as it existed at the time of Petitioner's trial, the United States Supreme Court ruled that the death penalty provision in N.C. Gen. Stat. § 14-17 that was in effect at the time of Petitioner's trial was unconstitutional. *See Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 961-62 (1976). The General Assembly then amended N.C. Gen. Stat. § 14-17 in 1977 to provide that the punishment for first degree murder was "death or

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[2] The version of N.C. Gen. Stat. § 14-17 in effect at the time of Petitioner's trial read as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death."

imprisonment in the State's prison for life as the court shall determine pursuant to [N.C. Gen. Stat. §] 15A-2000." *See* 1977 N.C. Sess. Laws, ch. 406, s. 1.

[3]

Meaning of "Life Imprisonment"

3. In 1973, the North Carolina General Assembly amended N.C. Gen. Stat. § 14-2, a statute dealing with sentencing in felony cases, to include the following language effective April 8, 1974:

> Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by a fine, by imprisonment for a term not exceeding ten years, or by both, in the discretion of the court. A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison.

N.C. Gen. Stat. § 14-2 (1974); *see* 1973 N.C. Sess. Laws, ch. 1201, s. 6. The General Assembly later repealed the "80 years" provision of this statute effective June 30, 1978. *See* 1977 N.C. Sess. Laws, ch. 711, s. 15. Life imprisonment was defined as "life without parole" in 1995. *See* N.C. Gen. Stat. § 14-17 (1995); 1993 N.C. Sess. Laws, ch. 21, ss. 1, 2, 5 (Extra Sess. 1994).

Calculation of Prison Credit Earned

4. A defendant convicted of a criminal offense is entitled to receive credit against his sentence for any time he has been in jail or prison, whether before or after trial. N.C. Gen. Stat. § 15-196.1 provides in relevant part that

> [t]he minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent,

> committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

N.C. Gen. Stat. § 15-196.1 (2009).

5. The General Assembly has also authorized the Department of Correction to reward prisoners with additional sentence reduction credits for different forms of good **[4]** conduct. At the time Petitioner was originally sentenced, N.C. Gen. Stat. § 148-13 provided as follows:

> The rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior, the amount of cash, clothing, etc., to be awarded prisoners after their discharge or parole.

N.C. Gen. Stat. § 148-13 (Cum. Supp. 1975) (amended 1979).

6. Prior to 1976, the Department of Correction accomplished the award of sentence reduction credits through a formal internal policy. As part of the new

North Carolina Administrative Code that followed the passage of the North Carolina Administrative Procedure Act, *see* N.C. Gen. Stat. § 150B-1 *et seq.*, the Department of Correction promulgated regulations related to inmate conduct that included the award of sentence reduction credits for good conduct and productive work. *See, e.g.*, 5 N.C.A.C. 2B .0100 *et seq.* (repealed). These provisions became effective on February 1, 1976.

7. On or about September 27, 1976, the North Carolina Administrative Code contained provisions related to a regime for the award of "good time," "gained time,"[3] and "merit time" sentence reduction credits to inmates housed in the North Carolina Department of Correction. The relevant versions of the Administrative Code in effect at that time read as follows:

> .0101 PURPOSE
>
> This policy established a method of computing Good Time for acceptable behavior and earned Gained Time for behavior which would not normally be required of an inmate confined within any of the facilities within the Division of Prisons. All inmate[s], including [Committed Youth Offenders] and those with life terms, shall be allowed a maximum of 107 days Good Time for acceptable behavior for each year

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[3] While the version of these regulations in effect at the time Petitioner was sentenced to life imprisonment refers to "gained time," later versions of the regulations refer to "gain time." The Court notes that it has fully reviewed all relevant law relating to the Department of Correction's authority to award sentence reduction credits and concludes that the two terms both refer to credits for work- and study-related activities and that there is no difference between the two terms.

served. Good Time shall be subjected to forfeiture for misbehavior as determined by appropriate disciplinary action. Regular Good Time shall be computed on [5] a pro rata basis and shall be equivalent of 8.94 days per 30.4 day month or 29.411% of total sentence length.

.0102 APPLICATION

All inmates who perform work, whether full-time or part-time or participate in specific training programs which would assist in their productive reentry into the community, shall be allowed additional Gained Time which shall be regulated as Gained Time I, II, and III. Gained Time shall not be subjected to forfeiture and will be administered as follows:

(1) Gained Time I. In addition to the 8.94 days per 30.4 day month of regular Good Time, inmates who perform short-term work assignments (requiring a minimum of 4 hours of actual work per day) or who participate in on-site academic and vocational training programs shall be eligible to receive an additional 2.09 days per month Gained Time for a total of 11.03 days per 30.4 [day] month. Such additional Gained Time shall not be subject to forfeiture for misbehavior and shall be the equivalent of 6.89% of the remaining sentence.

(2) Gained Time II. In addition to the regular Good Time of 8.94 days per 30.4 day month, all inmates who satisfactorily perform job assignments requiring a minimum of 6 hours work per day or

who perform acceptably in part-time work release or study release programs shall be allowed an additional 3.81 days Gained Time for a total of 12.75 days per 30.4 day month. Such additional Gained Time shall not be subject to forfeiture for misbehavior and shall be the equivalent of 12.55% of the remaining sentence.

(3) Gained Time III. In addition to regular Good Time of 8.94 days per 30.4 day month, all inmates performing assigned jobs requiring a minimum of 6 hours per day with requirements for special skills or specialized responsibilities such as specialized maintenance, cook, operator, canteen operator, or hospital technician, as well as inmates participating in full-time study release or work release shall be authorized to receive an additional 5.77 days Gained Time for a total of 14.71 days per 30.4 day month. Such additional Gained Time shall not be subjected to forfeiture for misbehavior and shall be the equivalent of 18.98% of the remaining sentence.

(4) Emergency Gained Time. All inmates who perform work beyond a regular 40 hour work week during extremely inclement weather (below 20 degrees Farenheit [sic]—Chill factor), or under emergency conditions shall be compensated on the basis of 1 day of emergency Gained Time for 1 day worked. The length of the day shall be deter-

> mined by the nature of the work assignment to be performed under the conditions mentioned above. Such Gained Time shall be [6] reported separately on the history card attachment (flimsy) and shall not be subjected to forfeiture for misbehavior.

.0103 PROCEDURE

....

> (d) Meritorious Gained Time.[4] The Director of Prisons may award additional Gained Time to an inmate for exceptionally meritorious behavior. Meritorious Gained Time shall not be subject to forfeiture.

....

5 N.C.A.C. 2B .0101, 0102, .0103 (Feb. 1, 1976).

8. In 1979, the North Carolina General Assembly enacted the Fair Sentencing Act. *See* N.C. Gen. Stat. § 15A-1340.1 *et seq.* (1981) (repealed); 1979 N.C. Sess. Laws, ch. 760, s. 2. This act applied to offenses committed on or after July 1, 1981.[5]

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[4] While there are different references to "meritorious gain time," "meritorious time," and "merit time" in the relevant regulations and exhibits in this case, the Court concludes that all of these refer to credits for "exemplary behavior" and that there is no difference between any of these terms. The Court will hereinafter refer to this type of credit as "merit time."

[5] Fair Sentencing was repealed upon the enactment of North Carolina's Structured Sentencing regime, which applies to offenses committed on or after October 1, 1994. *See* N.C. Gen. Stat. § 15A-1340.10 *et seq.*; 1993 N.C. Sess. Laws, ch. 538, s. 1.

9. After the Department of Correction's initial promulgation of regulations governing the award of sentencing reduction credits and the enactment of the Fair Sentencing regime, the General Assembly revised N.C. Gen. Stat. § 148-13 to address further how this system of rewards would work. The amended version of this statute provided in relevant part that:

> (b) With respect to prisoners who are serving prison or jail terms for [pre-Fair Sentencing] offenses ... and prisoners serving a life term for a Class C felony, the Secretary of Correction may, in his discretion, issue regulations regarding deductions of time from the terms of such prisoners for good behavior, meritorious conduct, work or study, participation in rehabilitation programs, and the like.

N.C. Gen. Stat. § 148-13(b) (1982) (repealed[6]); 1979 N.C. Sess Laws, ch. 760, s. 4.

[7]

10. The provision in § 148-13 as set forth in Statement of Relevant Law No. 10 was repealed effective October 1, 1994, pursuant to the implementation of Structured Sentencing, but the law repealing that provision contained a savings clause for those sentences imposed in Fair Sentencing and pre-Fair Sentencing cases, providing that those sentences would continue to be calculated according to the relevant pre-Structured Sentencing provisions. *See* 1993 N.C. Sess. Laws, ch. 24, s. 14(b) (Extra Sess. 1994) ("This act becomes effective October 1, 1994, and applies only to offenses occur-

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[6] *See* 1993 N.C. Sess. Laws, ch. 538, s. 32.

ring on or after that date. ... [T[he statutes that would be applicable to those [Fair Sentencing and pre-Fair Sentencing] sentences but for the provisions of this act remain applicable to those ... sentences.")

11. The Department of Correction amended its regulations on a number of occasions over time to change the rate at which inmates could be awarded good time, gain time, and merit time credits. *See, e.g.*, 5 N.C.A.C. 2B .0102(a) (February 1, 1982) (providing for twelve days of good time credits per month); 5 N.C.A.C. 2B .0102(a) (September 1, 1983) (providing one day good time credit for each day served with good conduct).

12. The good time, gain time, and merit time regulations promulgated by the Department of Correction were repealed effective January 1, 1994. *See* 1991 N.C. Sess. Laws, ch. 477, s. 3.

13. After the repeal of the administrative regulations in 1994, the Department of Correction began awarding sentence reduction credits pursuant to the Division of Prisons' internal "Policy and Procedure."[7] *See, e.g., Department of Correction, Division of Prisons Policy and Procedure*, ch. B, s. .0100 *et seq.* ("Sentence Reduction Credits") (2007).[8] The methods for comput-

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[7] After the repeal of the administrative regulations and the repeal of the relevant version of N.C. Gen. Stat. § 148-13, the authority for the Department of Correction's "Policy and Procedure" as it relates to sentence reduction credits continues to come from the savings clause found in 1993 N.C. Sess. Laws, ch. 24, s. 14(b) (Extra Sess. 1994) as described above in Statement of Governing Law No. 10.

[8] Although the Department of Correction's "Policy and Procedure" was not in evidence or otherwise discussed at the hearing in this matter, the Court notes that counsel for both sides in this

ing sentence reduction credits in the "Policy and [8] Procedure" are similar in both form and substance to those set forth in the earlier administrative code regulations. *Compare, e.g.*, 5 N.C.A.C. 2B .0103 (September 1, 1983) ("In addition to the Regular Good Time credits, inmates who perform short-term work assignments and/or who participate in specific training programs ... shall receive credit at the rate of two days per month.") *with, e.g., Policy and Procedure*, ch. B, s. .0112 (2007) ("Gain Time is sentence reduction credit awarded to eligible inmates [serving pre-Structured Sentencing sentences] for their participation in work and/or program activities.... In addition to Good Time credits, inmates who perform work assignments or participate in full time programs that are rated as Gain Time I may receive an additional two days per month, deducted from their sentence [sic]."[9]

The Bowden *Case*

14. On or about November 8, 2008, the North Carolina Court of Appeals issued its decision in *State v. Bobby E. Bowden*, __ N.C. App. __ (No. COA08-372) (November 8, 2008). The defendant in *Bowden* was seeking a declaration that the "life sentence" imposed in his case at a time when N.C. Gen. Stat. § 14-2 was in effect was actually a determinate term of eighty years.

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case stipulated in the related case of *Brown v. The N.C. Dep't of Correction* et al., Wake County File No. 09CVS23746, that the Court could take judicial notice of this "Policy and Procedure" in addressing petitioner Brown's claims. The Court accordingly takes judicial notice of the "Policy and Procedure" in this case as well.

[9] Section .0109 of chapter B of the "Policy and Procedure" also provides that "[t]his policy does not establish procedures for parole eligibility." *Policy and Procedure*, ch. B, s. .0109.

Having earned sentence reduction credits based on the Department of Correction's rules, Bowden contended that he was entitled to those sentence reduction credits against the eighty-year term provided for in § 14-2. In addressing his claim, the Court of Appeals concluded that

> N.C. Gen. Stat. § 14-2 (1974) treats defendant's life sentence as an 80-year sentence for all purposes. ... We hold that N.C. Gen. Stat. § 14-2 (1974) requires that defendant's life sentence is considered as an 80-year sentence for all purposes. We reverse the trial court's order and remand for a hearing to determine how many sentence reduction credits defendant is eligible to receive and how those credits are to be applied.

Bowden, _ N.C. App. at _, slip op. at 7.

[9]

15. On or about April 30, 2009, the North Carolina Supreme Court allowed the State of North Carolina's petition for discretionary review of the decision of the Court of Appeals in *Bowden*. *See State v. Bowden*, 363 N.C. 258 (2009).

16. On or about October 9, 2009, the North Carolina Supreme Court declined to address the merits of the decision of the Court of Appeals in *Bowden* and issued a decision that it had improvidently allowed discretionary review in the case. *State v. Bowden*, _ N.C. _ (October 9, 2009) (No. 514PA08). The mandate for the Supreme Court's decision issued on or about October 29, 2009. *See* Rule 32, North Carolina Rules of Appellate Procedure (2009).

FINDINGS OF FACT

1. On or about January 27, 1975, Petitioner was arrested and charged with the murder of William B. Turner, Sr. The facts related to the murder of Mr. Turner are briefly summarized as follows. On or about January 6, 1975, Petitioner and two other men met in Kinston, North Carolina, and agreed to commit some robberies to get some money. Petitioner furnished the group with two firearms. After riding around Lenoir County for a while, the group spotted someone they thought might be an "insurance man" and decided to rob him. Petitioner and one of the other men (Jessie Ray Harris) told the third man (Randolph Jackson Freeman) to wait around the corner with the car. Petitioner and Mr. Harris then took the firearms, put cloths over their faces, and confronted the "insurance man," who turned out to be Mr. Turner, as he came out of a private residence. When Mr. Turner put his hand in his pocket as if reaching for a gun, Petitioner shot Mr. Turner in the chest with a shotgun and then ran off with Mr. Harris to meet Mr. Freeman. Mr. Turner sought help and was transported to Lenoir Memorial Hospital, where he died on or about January 27, 1975.

2. On or about February 10, 1975, the grand jury of Lenoir County returned a true bill of indictment charging Petitioner with the First Degree Murder of Mr. Turner.

3. On or about March 19, 1975, Petitioner was convicted of first degree murder in Lenoir County Superior Court. Based on this conviction, Petitioner received a sentence of death. Petitioner's conviction and sentence were affirmed by the North **[10]** Carolina Supreme Court in an opinion dated July 8, 1976. *See State v. Jones*, 290 N.C. 292 (1976).

4. On or about September 1, 1976, the North Carolina Supreme Court entered an Order vacating Petitioner's death sentence pursuant to the United States Supreme Court's decision in *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976), and remanded Petitioner's case to Lenoir County Superior Court for the imposition of a sentence of life imprisonment.[10] Pursuant to this Order, Petitioner was sentenced on or about September 27, 1976, to a term of life imprisonment in the North Carolina Department of Correction.

5. Petitioner filed a *pro se* Motion for Appropriate Relief on or about June 19, 1979, alleging that the co-defendants Harris and Freeman gave false testimony at Petitioner's trial in return for lesser sentences. This Motion for Appropriate Relief was denied by Order of Superior Court Judge R. Michael Bruce on or about August 15, 1979.

6. Petitioner filed a *pro se* Motion for Appropriate Relief on or about August 24, 1989, alleging constitutional violations related to the selection of the grand

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[10] The Court notes that Petitioner's life sentence, as imposed after the United States Supreme Court's decision in *Woodson* but before the enactment of the 1978 version of N.C. Gen. Stat. § 14-17, was authorized pursuant to 1973 N.C. Sess. Laws, ch. 1201, s. 7:

> In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment.

1973 N.C. Sess. Laws, ch. 1201, s.7. *See also, e.g., State v. Davis*, 290 N.C. 511, 547-48 (1976) (citing same).

jury that found the true bill in Petitioner's case and the trial jury that found Petitioner guilty. This Motion for Appropriate Relief was denied by Order of Superior Court Judge James D. Llewellyn on or about August 25, 1989.

7. The Department of Correction has historically entered sentences of life imprisonment in its prison records as 9999998" or "LIFE." The Department of Correction records prior to the *Bowden* decision contain these terms in describing Petitioner's sentence.

[11]

8. Petitioner has been given the opportunity to participate in work release and other related programs, and has been awarded good time, gain time, and merit time credits by the Department of Correction based on his conduct and his participation in the aforementioned programs.

9. The Department of Correction has never used good time, gain time, or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment, whether those sentences were pre-Fair Sentencing, Fair Sentencing, or Structured Sentencing sentences. The Department of Correction has historically applied good time credits only to parole eligibility calculations, custody determinations, and in the event the Governor commuted a sentence from life imprisonment to a specified term of years.[11] The Department of Correction has historically

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[11] *See* N.C. Constitution, Art. III, § 5(6) ("The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons.").

applied gain time and merit time credits only in the event the Governor commuted a sentence from life imprisonment to a specified term of years.

10. Because Petitioner's sentence was listed in Department of Correction records as "LIFE," his good time, gain time, and merit time credits were never used by the Department of Correction in the calculation of an unconditional release date in his case.

11. In 2007, Petitioner was given the opportunity to take part in a "MAPP contract," pursuant to which the Department of Correction agreed to parole Petitioner on a date certain if he successfully completed all the terms and conditions (related to good behavior, work, etc.) of the contract. Petitioner's scheduled parole date if he successfully completes the MAPP contract is June 27, 2010.

12. After the North Carolina Supreme Court issued its decision in *Bowden*, combined records employees at the Department of Correction generated "OT-50[12] test run" release date calculations for inmates who were sentenced to terms of life **[12]** imprisonment between April 8, 1974, and June 30, 1978, to determine which inmates, if any, might be eligible for unconditional release pursuant to the *Bowden* decision.

13. At some point between October 9, 2009, and October 22, 2009, staff members at the New Hanover Correctional Center, where Petitioner was housed, initiated conversations with Petitioner about the possibility that he would be released from prison on October

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[12] "OT-50" refers to the program that the Department of Correction uses to track sentencing reduction credits and calculate unconditional release dates.

29, 2009, based on the ruling in *Bowden*. After these conversations, Petitioner was allowed to call his wife to discuss his potential release. Petitioner also signed some paperwork related to his release, and his name was written on a white board known as the "release board" where the names of inmates scheduled for release are written.

14. On or about October 29, 2009, the mandate on the North Carolina Supreme Court's ruling in the *Bowden* case issued.

15. Petitioner was not released from the Department of Correction on October 29, 2009.

16. On or about November 10, 2009, Secretary of Correction Alvin W. Keller, Jr., issued a memorandum with respect to the calculation of unconditional release dates for the inmates affected by the *Bowden* decision. In that memorandum, Secretary Keller directed that "for each life sentence imposed for crimes during [the April 8, 1974—June 30, 1978,] time period the unconditional release date shall be calculated as 80 years minus applicable jail credit earned while the prisoner awaited convictions and sentencing." *See* Exhibit D, Affidavit of Alvin W. Keller, Jr.

17. As of November 30, 2009, Petitioner had accrued actual prison credit for time served in an amount of 12,276 days.

18. Pursuant to Secretary Keller's memorandum, the Department of Correction calculated Petitioner's unconditional release date. As of the date of the entry of this Order, Petitioner's unconditional release date as posted on the "Offender Public [13] Information" por-

tion of the North Carolina Department of Correction website[13] is February 27, 2055.

19. As of November 30, 2009, Petitioner had accrued credits for good time, gain time, and merit time during his incarceration based on his participation in work, study, or other programs in the following amounts:

Good time:	14041 days
Gain time:	2146 days
Merit time:	1745 days

Petitioner has also accrued "penalty time" during his incarceration in the amount of fifty days.[14]

20. Petitioner did not accrue any good, gain, or merit time credits prior to his being resentenced to a sentence of life imprisonment on September 27, 1976.

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[13] *See* http://webapps6.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0214013&searchlastName=jones&searchFirstName=alford&listurl=pagelistoffendersearchresults&listpage=1

[14] At the evidentiary hearing in this case, Teresa O'Brien, an employee of the combined records section in the Department of Correction, testified that, with respect to the calculation of Petitioner's accrued credit, there was a mathematical adjustment that resulted in thirty-eight days being subtracted from the total credit attributed to Petitioner. *See* Attachment Y, Affidavit of Teresa O'Brien (noting a negative thirty-eight day credit under "other credits"). O'Brien testified that this adjustment was prompted by a change in the Department of Correction's recordkeeping system a number of years ago. While the Court does not conclude that this thirty-eight day negative credit is meaningful given the calculation of earned time as a whole, the Court notes this additional fact for the record.

21. The Department of Correction did not apply any of Petitioner's good time, gain time, and merit time credits in the calculation of his unconditional release date.

22. Based on the calculations of the Department of Correction, if Petitioner's good time, gain time, and merit time credit as described in Finding of Fact No. 19 above were applied to his eighty-year sentence, Petitioner's calculated release date would be February 4, 2006.

[14]

CONCLUSIONS OF LAW

1. The Court has the requisite jurisdiction to address the matters contained in the Petition.

2. Petitioner has the burden of persuasion in a habeas proceeding in which he contends he is being illegally restrained. *See* N.C. Gen. Stat. § 17-3 ("Every person imprisoned or restrained of his liberty within this State ... may prosecute a writ of habeas corpus ... to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom." *See also, e.g., State v. Jones*, 113 N.C. 669, 671-72 (1893).

3. The North Carolina General Assembly has the power to define what a sentence of "life imprisonment" means. *See Bowden*, __ N.C. App. at __, slip op. at 7 ("[T]he Legislature merely defines the term of life imprisonment, which it has the authority to do. Our Legislature is granted the power and the authority to define crimes and set punishment for those crimes.") (citation omitted); *see also State v. Allen*, 346 N.C. 731, 737 (1997) (rejecting challenge to life imprisonment without parole statutes and concluding that "the General Assembly alone prescribes the maximum and

minimum punishment which can be imposed on those convicted of crimes") (citing *State v. Perry*, 316 N.C. 87, 101 (1986)); *State v. Niccum*, 293 N.C. 276, 283 (1977) (noting that the General Assembly "provided that 'a sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison.'") (quoting 1973 N.C. Sess. Laws, ch. 1201, s. 6); 1973 N.C. Sess. Laws, ch. 1201 (entitled "AN ACT TO AMEND G.S. 14-17 MURDER DEFINED AND PUNISHMENT PROVIDED FOR MURDER, RAPE, BURGLARY, AND ARSON").

4. When Petitioner's life sentence was imposed in 1976, the governing law as enacted by the North Carolina General Assembly—N.C. Gen. Stat. § 14-2—mandated that Petitioner's "life sentence" was to be considered for all purposes a term of eighty years in the North Carolina Department of Correction. *See Bowden*, __ N.C. App. at __, slip op. at 7.

5. Respondents concede that sentence reduction credits would be used for all purposes, including the calculation of an unconditional release date, if Petitioner's [15] sentence was the subject of a gubernatorial commutation to a specified term of years, or if Petitioner had originally been sentenced to a specified term of years. For the purposes of calculating an unconditional release date under North Carolina law, there is no legal basis to distinguish between a specified term of years as imposed pursuant to a gubernatorial commutation, a specified term of years as originally imposed by a court of competent jurisdiction, or a specified term of years imposed and as defined by North Carolina statute. The Court concludes as a matter of law that Petitioner's "life sentence" as defined by the North Carolina General Assembly has at all times since its imposi-

tion been a determinate sentence of eighty years in the State's prison.

6. At the time Petitioner's life sentence was imposed, the Department of Correction was obligated to calculate his sentence as an eighty-year term.

7. The Secretary of Correction has been given the authority and discretion under N.C. Gen. Stat. § 148-13 to issue regulations governing the award of good time, gain time, and merit time. The relevant version of § 148-13 in effect at the time the first set of regulations was adopted did not place any limitations on the Secretary's discretion in deciding how to award credits to inmates serving sentences for pre-Fair Sentencing crimes.

8. The Secretary of Correction did promulgate regulations as part of the Administrative Code (and later place into effect the internal "Policy and Procedure") in an exercise of his discretion pursuant to the authority set forth in N.C. Gen. Stat. § 148-13.

9. The regulations (and "Policy and Procedure") placed into effect by the Secretary of Correction pursuant to N.C. Gen. Stat. § 148-13 give the Department of Correction the discretion to award credits to inmates for good time, gain time, and merit time.

10. Based on the Department of Correction's regulations, policy, and procedure, and the conduct of Petitioner as demonstrated through the Department of Correction's records, Petitioner was in the class of inmates authorized to receive good time, gain time, and merit time credits. The Secretary of Correction appropriately awarded Petitioner with good time, gain time, and merit time credits in accordance with the **[16]** De-

partment of Correction regulations, policy, and procedure based on his conduct while incarcerated.

11. A reviewing court must give broad deference to an agency's interpretation of its own regulations. The agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation itself, and the reviewing court must defer to the agency's interpretation unless a different reading is compelled by the plain language of the regulation or other indications about the intent of the agency at the time of the promulgation of the regulation. *See, e.g., Morrell v. Flaherty*, 338 N.C. 230, 237-38 (1994), *cert. denied sub nom. Morrell v. Britt*, 515 U.S. 1122, 132 L. Ed. 2d 282 (1995).

12. There is nothing in any relevant provision of the North Carolina General Statutes, the North Carolina Administrative Code, the Department of Correction's "Policy and Procedure," or North Carolina case law precedent that specifically authorizes the Secretary of Correction to apply the good time, gain time, merit time, or any other awarded credits only for certain purposes and not for others. Just as the Court of Appeals concluded in *Bowden* that "we are not permitted to interpolate or superimpose provisions or limitations which are not contained in the text of the statute[,] *Bowden*, __ N.C. App. at __, slip op. at 6, this Court is not permitted to interpolate or superimpose provisions or limitations that are not contained in the text of the statutes, the Department's own regulations, policy, or procedure, or any other legal authority.

13. The Court concludes that the Department of Correction's interpretation of its regulations regarding the award of sentence reduction credits is clearly erroneous, and that a different reading is compelled by the

plain language of the regulations. The Department of Correction's historical policy of awarding good time, gain time, and merit time only for the purposes of parole eligibility, custody determinations, and sentence commutation calculations is not authorized by North Carolina statute, by the regulations, policy, and procedure the Department of Correction itself placed into effect, or by any North Carolina case law precedent. While the Department of Correction does have the authority either to award or not to award sentence reduction credits, the Department of Correction does not have the discretion to award sentence reduction credits for certain purposes but to deny the use of the same sentence reduction credits for other purposes based on the regulations, policy, and procedure the Department itself put into effect. [17] The North Carolina General Assembly could have enacted laws providing that sentence reduction credits were to be awarded only for the purposes of parole eligibility, custody determinations, and sentence commutation calculations and not for the calculation of an unconditional release date. It did not. The Department of Correction could have put into effect rules awarding sentence reduction credits only for the purposes of parole eligibility, custody determinations, and sentence commutation calculations and not for the calculation of an unconditional release date. It did not.[15]

14. Respondents contend that the decision of the North Carolina Court of Appeals in *Teasley v. Beck*, 155 N.C. App. 282 (2002), *disc. rev. denied*, 357 N.C. 169

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[15] It is not lost on the Court that the Department of Correction currently calls good time, gain time, and merit time "sentence reduction credits" in its own 2007 "Policy and Procedure."

(2003), is binding on this Court for the proposition that the Department of Correction has not exercised its discretion to promulgate regulations authorizing the award of sentence reduction credits to inmates serving "life sentences," even if those "life sentences" are defined as eighty-year terms. *See Teasley*, 155 N.C. App. at 292 ("T]he Secretary has not ... exercised [his] authority under Section 148-13(b) to pass regulations for the application of good, gain, and meritorious time credits for those serving life sentences.") (citation omitted). The Court concludes as a matter of law that *Teasley* does not apply here. In *Teasley*, the Court of Appeals concluded that N.C. Gen. Stat. § 148-13(b) did not mandate that sentence reduction credits be applied to the inmate's Fair Sentencing Class C life sentence for the purpose of calculating parole eligibility. *See Teasley*, 155 N.C. App. at 288 ("The paramount question remains: what, if any, is the effect of the "sentence reduction credit" regulations on plaintiffs' parole eligibility dates.") This case does not deal with parole eligibility in the context of an indeterminate Fair Sentencing life sentence, but rather the calculation of Petitioner's unconditional release date based on the determinate sentence imposed on Petitioner as defined by the General Assembly.

15. Counsel for Respondents also argued at the hearing on this matter that any ruling in favor of Petitioner could only spring from the Court's award of sentence reduction credits for the purpose of calculating Petitioner's unconditional release date. The Court is not awarding any sentence reduction credits to Petitioner in relation to his unconditional release date. The Department of Correction awarded the sentencing reduction credits to Petitioner pursuant to North Carolina statutory authority and the regulations, policy, and

procedure the Department itself put into effect. The Court's role [18] here is limited to interpreting whether the Department has acted in accordance with that statutory authority and the regulations, policy, and procedure the Department itself put into effect. The Court concludes as a matter of the law that the Department has not done so.

16. Because Petitioner earned sentence reduction credits in accordance with Department of Correction regulations, policy, and procedure, he has a "liberty interest" in those credits that is subject to constitutional protection. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 558, 41 L. Ed. 2d 935, 952 (1974).

17. Because the Department of Correction's interpretation of its own regulations, policy, and procedure improperly denied Petitioner all the benefits associated with the sentencing reduction credits he earned, the Department of Correction's policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating an unconditional release date in the event of a gubernatorial commutation is a violation of Petitioner's due process rights under the United States Constitution.

18. Because the Department of Correction's interpretation of its own regulations, policy, and procedure improperly denied Petitioner all the benefits associated with the sentencing reduction credits he earned, the Department of Correction's policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating an unconditional release date in the event of a gubernatorial commutation is a violation of Petitioner's rights under the

"Law of the Land" Clause of the North Carolina Constitution, *see* N.C. Const., Art. I, § 19.

19. Because the Department admits that other inmates serving determinate sentences have been and are still awarded sentence reduction credits that apply to their unconditional release dates, the Department of Correction's policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating an unconditional release date in the event of a gubernatorial commutation is a violation of Petitioner's equal protection rights under the United States Constitution.

[19]

20. Because the Department of Correction in fact awarded Petitioner sentence reduction credits in the form of good time, gain time, and merit time, Petitioner is entitled under the North Carolina General Statutes and the Department of Correction's regulations, policy, and procedure to have these credits deducted from his sentence for all purposes, including the calculation of an unconditional release date.

21. Given the application of the sentence reduction credits that Petitioner earned pursuant to the Department of Correction's regulations, policy, and procedure, and the earned prison credit for time he has served on his sentence, Petitioner's unconditional release date for the "life sentence" as defined by the North Carolina General Assembly in N.C. Gen. Stat. § 14-2 was February 4, 2006.

22. Petitioner has served the entirety of the "life sentence" imposed in his case.

23. Petitioner has carried his burden of proof showing that he is entitled to relief in this habeas petition.

CONCLUSION

Petitioner was convicted of first degree murder in the cold-blooded killing of William B. Turner, Sr., and was eventually sentenced to life imprisonment for that killing. The Court has concluded as a matter of law that Petitioner has served the entirety of that life sentence as imposed in the Superior Court of Lenoir County, as defined and mandated by the North Carolina General Assembly, and as credited pursuant to the North Carolina Department of Correction's own regulations, policy, and procedure. Based on the foregoing, IT IS HEREBY ORDERED that the Petition for Habeas Corpus filed by Alford Jones is ALLOWED. IT IS FURTHER ORDERED that Petitioner Alford Jones is to be released unconditionally from the North Carolina Department of Correction no later than 5 p.m. today, December 14, 2009.

[20]

This Order is entered out of session with the prior consent of all parties as noted on the record at the hearing on this matter.

This, the 14th day of December, 2009.

/s/ Ripley E. Rand
Ripley E. Rand
Superior Court Judge

APPENDIX F

STATE OF NORTH CAROLINA COUNTY OF WAKE		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
FAYE B. BROWN, Petitioner, v. THE NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER, in his capacity as Secretary of the Department of Correction, and KENNETH ROYSTER, in his capacity as Superintendent of Raleigh Correctional Center for Women, Respondents.	)	File No. 09CVS23746 (related to Martin County, File No. 75CR3812)[1]

[1] Although Petitioner's sentence was imposed in Martin County, the undersigned judge as presiding in Wake County Superior Court does have the requisite jurisdiction and appropriate venue to address the matters presented in the Petition. *See* N.C. Gen. Stat. § 17-6 ("Application for the writ shall be made in writing, signed by the applicant ... [t]o any one of the superior court judges, either during a session or in vacation."); *see also, e.g., McEachern v. McEachern*, 210 N.C. 98, 102 (1936) ("[A]ny judge, anywhere, has the power to issue the writ ....").

stamps:
CERTIFIED A TRUE COPY
/s/ [illegible]
CLERK OF SUPERIOR COURT

FILED
2009 DEC 14 AM 6:57
WAYNE COUNTY C.S.C.
BY _____

MEMORANDUM OPINION AND ORDER

This matter comes before this Court on Faye B. Brown's Petition for Writ of Habeas Corpus filed November 23, 2009. The Court held a hearing on this Petition on December 11, 2009. Present at the hearing were Faye B. Brown, Petitioner; Sarah Jessica Farber, Esq., Emily Coward, Esq., and Mary Pollard, Esq., counsel for Petitioner; and Tiare Smiley, Esq., and Elizabeth Parsons, Esq., counsel for Respondents. The Court has considered the record proper in this case, including the evidence presented at the hearing, the arguments and submissions of both sides, and a full review of the Martin County court file related to the Petition filed in this case, including the North Carolina Supreme Court's decision addressing Petitioner's direct appeal of her conviction for first degree murder, *see State v. Squire* et al., 292 N.C. 494 (1977), *cert. denied sub nom. Broun v. North Carolina*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977).

The Court notes for the record that the North Carolina Advocates for Justice moved for Leave to File an *Amicus Curiae* Brief in this matter. The Court has considered this Motion and finds that it has merit. Accordingly, the Motion of the North Carolina Advocates for Justice for Leave to File an *Amicus Curiae* Brief in

this matter is [2] ALLOWED, and the Court will consider the Brief as it relates to the issues presented in this case.

Based on the consideration of the record proper as noted above, the Court makes the following Statement of Governing Law, Findings of Fact, and Conclusions of Law.

STATEMENT OF GOVERNING LAW

1. The relevant North Carolina sentencing regime for the purposes of this Order is best described as the "pre-Fair Sentencing" regime. Under pre-Fair Sentencing, crimes were divided up into either felonies or misdemeanors. There were no individual classes of offense as have been provided for in Fair Sentencing and Structured Sentencing.

Punishment for First Degree Murder

2. At the time that Petitioner's trial took place, first degree murder was punishable exclusively by the death penalty. *See* N.C. Gen. Stat. § 14-17 (Cum. Supp. 1975); 1973 N.C. Sess. Laws, ch. 1201, s.1;[2] *see also State v. Niccum*, 293 N.C. 276, 282-83 (1977). In reviewing North Carolina's capital sentencing regime as it existed at the time of Petitioner's trial, the United States Supreme Court ruled that the death penalty

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[2] The version of N.C. Gen. Stat. § 14-17 in effect at the time of Petitioner's trial read as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death."

provision in N.C. Gen. Stat. § 14-17 that was in effect at the time of Petitioner's trial was unconstitutional. *See Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 961-62 (1976). The General Assembly then amended N.C. Gen. Stat. § 14-17 in 1977 to provide that the punishment for first degree murder was "death or imprisonment in the State's prison for life as the court shall determine pursuant to [N.C. Gen. Stat. §] 15A-2000." *See* 1977 N.C. Sess. Laws, ch. 406, s. 1.

[3]

Meaning of "Life Imprisonment"

3. In 1973, the North Carolina General Assembly amended N.C. Gen. Stat. § 14-2, a statute dealing with sentencing in felony cases, to include the following language effective April 8, 1974:

> Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by a fine, by imprisonment for a term not exceeding ten years, or by both, in the discretion of the court. A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison.

N.C. Gen. Stat. § 14-2 (1974); *see* 1973 N.C. Sess. Laws, ch. 1201, s. 6. The General Assembly later repealed the "80 years" provision of this statute effective June 30, 1978. *See* 1977 N.C. Sess. Laws, ch. 711, s. 15. Life imprisonment was defined as "life without parole" in 1995. *See* N.C. Gen. Stat. § 14-17 (1995); 1993 N.C. Sess. Laws, ch. 21, ss. 1, 2, 5 (Extra Sess. 1994).

Calculation of Prison Credit Earned

4. A defendant convicted of a criminal offense is entitled to receive credit against her sentence for any

time she has been in jail or prison, whether before or after trial. N.C. Gen. Stat. § 15-196.1 provides in relevant part that

> [t]he minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

N.C. Gen. Stat. § 15-196.1 (2009).

5. The General Assembly has also authorized the Department of Correction to reward prisoners with additional sentence reduction credits for different forms of good [4] conduct. At the time Petitioner was originally sentenced, N.C. Gen. Stat. § 148-13 provided as follows:

> The rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior, the amount of cash, clothing, etc., to be awarded prisoners after their discharge or parole.

N.C. Gen. Stat. § 148-13 (Cum. Supp. 1975) (amended 1979).

6. Prior to 1976, the Department of Correction accomplished the award of sentence reduction credits through a formal internal policy. As part of the new North Carolina Administrative Code that followed the passage of the North Carolina Administrative Procedure Act, *see* N.C. Gen. Stat. § 150B-1 *et seq.*, the Department of Correction promulgated regulations related to inmate conduct that included the award of sentence reduction credits for good conduct and productive work. *See, e.g.*, 5 N.C.A.C. 2B .0100 *et seq.* These provisions became effective on February 1, 1976.

7. On or about June 30, 1977, the North Carolina Administrative Code contained provisions related to a regime for the award of "good time," "gained time,"[3] and "merit time" sentence reduction credits to inmates housed in the North Carolina Department of Correction. The relevant versions of the Administrative Code in effect at that time read as follows:

> .0101 PURPOSE
>
> This policy established a method of computing Good Time for acceptable behavior and earned Gained Time for behavior which would not normally be required of an inmate confined

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[3] While the version of these regulations in effect at the time Petitioner was sentenced to life imprisonment refers to "gained time," later versions of the regulations refer to "gain time." The Court notes that it has fully reviewed all relevant law relating to the Department of Correction's authority to award sentence reduction credits and concludes that the two terms both refer to credits for work- and study-related activities and that there is no difference between the two terms.

within any of the facilities within the Division of Prisons. All inmate[s], including [Committed Youth Offenders] and those with life terms, shall be allowed a maximum of 107 days Good Time for acceptable behavior for each year served. Good Time shall be subjected to forfeiture for misbehavior as determined by appropriate disciplinary action. Regular Good Time shall be computed on a pro rata basis and shall be equivalent of 8.94 days per 30.4 day month or 29.411% of total sentence length.

[5]

.0102 APPLICATION

All inmates who perform work, whether full-time or part-time or participate in specific training programs which would assist in their productive reentry into the community, shall be allowed additional Gained Time which shall be regulated as Gained Time I, II, and III. Gained Time shall not be subjected to forfeiture and will be administered as follows:

(1) Gained Time I. In addition to the 8.94 days per 30.4 day month of regular Good Time, inmates who perform short-term work assignments (requiring a minimum of 4 hours of actual work per day) or who participate in on-site academic and vocational training programs shall be eligible to receive an additional 2.09 days per month Gained Time for a total of 11.03 days per 30.4 [day] month. Such additional Gained Time shall not be subject to forfeiture for misbehavior and shall be the

equivalent of 6.89% of the remaining sentence.

(2) Gained Time II. In addition to the regular Good Time of 8.94 days per 30.4 day month, all inmates who satisfactorily perform job assignments requiring a minimum of 6 hours work per day or who perform acceptably in part-time work release or study release programs shall be allowed an additional 3.81 days Gained Time for a total of 12.75 days per 30.4 day month. Such additional Gained Time shall not be subject to forfeiture for misbehavior and shall be the equivalent of 12.55% of the remaining sentence.

(3) Gained Time III. In addition to regular Good Time of 8.94 days per 30.4 day month, all inmates performing assigned job requiring a minimum of 6 hours per day with requirements for special skills or specialized responsibilities such as specialized maintenance, cook, operator, canteen operator, or hospital technician, as well as inmates participating in full-time study release or work release shall be authorized to receive an additional 5.77 days Gained Time for a total of 14.71 days per 30.4 day month. Such additional Gained Time shall not be subjected to forfeiture for misbehavior and shall be the equivalent of 18.98% of the remaining sentence.

(4) Emergency Gained Time. All inmates who perform work beyond a regular 40 hour work week during extremely inclement weather (below 20 degrees Farenheit [sic]—Chill factor), or under emergency conditions shall be compensated on the basis of 1 day emergency Gained Time for 1 day worked. The length of the day shall be determined by the nature of the work assignment to be performed under the conditions mentioned above. Such Gained Time shall be reported separately on the history card attachment (flimsy) and shall not be subjected to forfeiture for misbehavior.

[6]

.0103 PROCEDURE

....

(d) Meritorious Gained Time.[4] The Director of Prisons may award additional Gained Time to an inmate for exceptionally meritorious behavior. Meritorious Gained Time shall not be subject to forfeiture.

....

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[4] While there are different references to "meritorious gain time," "meritorious time," and "merit time" in the relevant regulations and exhibits in this case, the Court concludes that all of these refer to credits for "exemplary behavior" and that there is no difference between any of these terms. The Court will hereinafter refer to this type of credit as "merit time."

5 N.C.A.C. 2B .0101, 0102, .0103 (Feb. 1, 1976).

8. In 1979, the North Carolina General Assembly enacted the Fair Sentencing Act. *See* N.C. Gen. Stat. § 15A-1340.1 *et seq.* (1981) (repealed); 1979 N.C. Sess. Laws, ch. 760, s. 2. This act applied to offenses committed on or after July 1, 1981.[5]

9. After the Department of Correction's initial promulgation of regulations governing the award of sentencing reduction credits and the enactment of the Fair Sentencing regime, the General Assembly revised N.C. Gen. Stat. § 148-13 to address further how this system of rewards would work. The amended version of this statute provided in relevant part that:

> (b) With respect to prisoners who are serving prison or jail terms for [pre-Fair Sentencing] offenses ... and prisoners serving a life term for a Class C felony, the Secretary of Correction may, in his discretion, issue regulations regarding deductions of time from the terms of such prisoners for good behavior, meritorious conduct, work or study, participation in rehabilitation programs, and the like.

N.C. Gen. Stat. § 148-13(b) (1982) 4 (repealed[6]); 1979 N.C. Sess Laws, ch. 760, s. 4.

10. The provision in § 148-13 as set forth in Statement of Relevant Law No. 9 was repealed effective Oc-

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[5] Fair Sentencing was repealed upon the enactment of North Carolina's Structured Sentencing regime, which applies to offenses committed on or after October 1, 1994. *See* N.C. Gen. Stat. § 15A-1340.10 *et seq.*; 1993 N.C. Sess. Laws, ch. 538, s. 1.

[6] *See* 1993 N.C. Sess. Laws, ch. 538, s. 32.

tober 1, 1994, pursuant to the implementation of Structured Sentencing, but the law repealing that provision contained a savings clause for those [7] sentences imposed in Fair Sentencing and pre-Fair Sentencing cases, providing that those sentences would continue to be calculated according to the relevant pre-Structured Sentencing provisions. *See* 1993 N.C. Sess. Laws, ch. 24, s. 14(b) (Extra Sess. 1994) ("This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date.... [T[he statutes that would be applicable to those [Fair Sentencing and pre-Fair Sentencing] sentences but for the provisions of this act remain applicable to those ... sentences.")

11. The Department of Correction amended its regulations on a number of occasions over time to change the rate at which inmates could be awarded good time, gain time, and merit time credits. *See, e.g.*, 5 N.C.A.C. 2B .0102(a) (February 1, 1982) (providing for twelve days of good time credits per month); 5 N.C.A.C. 2B .0102(a) (September 1, 1983) (providing one day good time credit for each day served with good conduct).

12. The good time, gain time, and merit time regulations promulgated by the Department of Correction as contained in the North Carolina Administrative Code were repealed effective January 1, 1994. *See* 1991 N.C. Sess. Laws, ch. 477, s. 3.

13. After the repeal of the administrative regulations in 1994, the Department of Correction began awarding sentence reduction credits pursuant to the

Division of Prisons' internal "Policy and Procedure"[7] *See, e.g., Department of Correction, Division of Prisons Policy and Procedure*, ch. B, s. .0100 *et seq.* ("Sentence Reduction Credits") (2007).[8] The methods for computing sentence reduction credits in the "Policy and Procedure" are similar in both form and substance to those set forth in the earlier administrative code regulations. *Compare, e.g.*, 5 N.C.A.C. 2B .0103(a)(1) (September 1, 1983) ("In addition to the Regular Good Time credits, inmates who perform short-term work assignments and/or who participate in specific training programs ... shall receive [8] credit at the rate of two days per month.") *with, e.g., Policy and Procedure*, ch. B, s. .0112 (2007) ("Gain Time is sentence reduction credit awarded to eligible inmates [serving pre-Structured Sentencing sentences] for their participation in work and/or program activities. ... In addition to Good Time credits, inmates who perform work assignments or participate in full time programs that are rated as Gain Time I may receive an additional two days per month, deducted from their sentence [sic]."[9]

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[7] After the repeal of the administrative regulations and the repeal of the relevant version of N.C. Gen. Stat. § 148-13 that authorized those regulations, the authority for the Department of Correction's "Policy and Procedure" as it relates to sentence reduction credits continues to come from the savings clause found in 1993 N.C. Sess. Laws ch. 24, s. 14(b) (Extra Sess. 1994) as described above in Statement of Governing Law No. 10.

[8] With the stipulation of both sides in this case, the Court takes judicial notice of the Policy and Procedure adopted by the Department of Correction.

[9] Section .0109 of chapter B of the "Policy and Procedure" also provides that "[t]his policy does not establish procedures for parole eligibility." *Policy and Procedure*, ch. B, s. .0109.

The Bowden *Case*

14. On or about November 8, 2008, the North Carolina Court of Appeals issued its decision in State v. Bobby E. Bowden, __ N.C. App. __ (No. COA08-372) (November 8, 2008). The defendant in *Bowden* was seeking a declaration that the "life sentence" imposed in his case at a time when N.C. Gen. Stat. § 14-2 was in effect was actually a determinate term of eighty years. Having earned sentence reduction credits based on the Department of Correction's rules, Bowden contended that he was entitled to those sentence reduction credits against the eighty-year term provided for in § 14-2. In addressing his claim, the Court of Appeals concluded that

> N.C. Gen. Stat. § 14-2 (1974) treats defendant's life sentence as an 80-year sentence for all purposes. ... We hold that N.C. Gen. Stat. § 14-2 (1974) requires that defendant's life sentence is considered as an 80-year sentence for all purposes. We reverse the trial court's order and remand for a hearing to determine how many sentence reduction credits defendant is eligible to receive and how those credits are to be applied.

Bowden, __ N.C. App. at __, slip op. at 7.

15. On or about April 30, 2009, the North Carolina Supreme Court allowed the State of North Carolina's petition for discretionary review of the decision of the Court of Appeals in *Bowden*. *See State v. Bowden*, 363 N.C. 258 (2009).

16. On or about October 9, 2009, the North Carolina Supreme Court declined to address the merits of the decision of the Court of Appeals in *Bowden* and is-

sued a decision that it had improvidently allowed discretionary review in the case. *State v. Bowden*, __ N.C. __ (October 9, 2009) (No. 514PA08). The mandate for the Supreme [9] Court's decision issued on or about October 29, 2009. *See* Rule 32, North Carolina Rules of Appellate Procedure (2009).

FINDINGS OF FACT

1. On or about September 2, 1975, Petitioner was arrested and charged with the murder of Guy Thomas Davis, Jr. The facts related to the murder of Mr. Davis are briefly summarized as follows. On or about September 2, 1975, the Jamesville branch of Branch Bank & Trust was robbed by a man (later identified as Joseph Seaborn) carrying a sawed-off shotgun and a woman (later identified as Petitioner) carrying a pistol. Witnesses saw the man and woman in the bank parking lot next to a brown Pontiac automobile that was being driven by a third person (later identified as Frankie Jerome Squire). Not long after the robbery, North Carolina State Highway Patrol Trooper Guy Thomas Davis, Jr., stopped a brown Pontiac automobile at an intersection in Williamston for a traffic violation. As Trooper Davis approached the automobile, an occupant of the Pontiac shot him in the throat with the shotgun. Trooper Davis died at the scene. Around forty-five minutes later, police found the brown Pontiac at the bottom of a creek bed, and then set out on a canvass of the surrounding area, which included a soybean field. Squire, Seaborn, and Brown were found hiding in the soybean field. Money identified as having been from the robbery and a pistol were found near where the three had been hiding. A later, more detailed search of the area with a metal detector resulted in the shotgun being recovered. Seaborn admitted having been involved in the robbery and having shot Trooper Davis,

although he said the gun discharged by accident. Squire admitted having been the driver of the car and that he heard the gun discharge from the back seat when Trooper Davis approached the car. Brown admitted having been involved in the robbery and having heard the gun discharge when Trooper Davis approached the car.

2. On or about September 29, 1975, the grand jury of Martin County returned a true bill of indictment charging Petitioner with the First Degree Murder of Trooper Davis.

3. On or about January 5, 1976, Petitioner was convicted of first degree murder in Martin County Superior Court. Based on this conviction, Petitioner received a sentence of death. Petitioner's conviction was affirmed on appeal, but the Supreme Court vacated the death sentence pursuant to the United States Supreme Court's **[10]** decision in *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976),[10] and remanded the case to Martin County Superior Court for the imposition of a sentence of life imprisonment. *See State v.*

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[10] The Court notes that Petitioner's life sentence, as imposed after the United States Supreme Court's decision in *Woodson* but before the enactment of the 1978 version of N.C. Gen. Stat. § 14-17, was authorized pursuant to 1973 N.C. Sess. Laws, ch. 1201, s. 7:

> In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment.

1973 N.C. Sess. Laws, ch. 1201, s.7. *See also, e.g., State v. Davis*, 290 N.C. 511, 547-48 (1976) (citing same)

Squire et al., 292 N.C. 494 (1977), *cert. denied sub nom. Brown v. North Carolina*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977).

4. On or about June 30, 1977, Petitioner was sentenced in Martin County Superior Court to a term of life imprisonment.

5. Petitioner filed a *pro se* Motion for Appropriate Relief on or about April 24, 1984, alleging (among other things) ineffective assistance of counsel. This Motion for Appropriate Relief was denied by Order of Superior Court Judge James D. Llewellyn on or about August 2, 1984.

6. The Department of Correction has historically entered sentences of life imprisonment in its prison records as "9999998" or "LIFE." The Department of Correction records prior to the *Bowden* decision contain these descriptive terms in describing Petitioner's sentence.

7. Petitioner has been given the opportunity to participate in work release and other related programs, and has been awarded good time, gain time, and merit time credits by the Department of Correction based on her conduct and her participation in the aforementioned programs.

8. The Department of Correction has never used good time, gain time, or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment, whether those sentences were pre-Fair Sentencing, Fair Sentencing, or Structured Sentencing sentences. The Department of Correction has [11] historically applied good time credits only to parole eligibility calculations, custody determinations, and in the event the Governor com-

muted a sentence from life imprisonment to a specified term of years.[11] The Department of Correction has historically applied gain time and merit time credits only in the event the Governor commuted a sentence from life imprisonment to a specified term of years.

9. Because Petitioner's sentence was listed in Department of Correction records as "LIFE," the good time, gain time, and merit time credits she earned were never used by the Department of Correction in the calculation of an unconditional release date in her case.

10. After the North Carolina Supreme Court issued its decision in *Bowden*, combined records employees at the Department of Correction generated "OT-50[12] test run" release date calculations for inmates who were sentenced to terms of life imprisonment between April 8, 1974, and June 30, 1978, to determine which inmates, if any, might be eligible for unconditional release pursuant to the *Bowden* decision.

11. At some point between October 9, 2009, and October 22, 2009, staff members at the Raleigh Correctional Center for Women, where Petitioner was housed, initiated conversations with Petitioner about the possibility that she would be released from prison on October 29, 2009, based on the ruling in *Bowden*.

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[11] *See* N.C. Constitution, Art. III, § 5(6) ("The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons.").

[12] "OT-50" refers to the program that the Department of Correction uses to track sentencing reduction credits and calculate unconditional release dates.

12. On or about October 29, 2009, the mandate on the North Carolina Supreme Court's ruling in the *Bowden* case issued.

13. Petitioner was not released from the Department of Correction on October 29, 2009.

14. On or about November 10, 2009, Secretary of Correction Alvin W. Keller, Jr., issued a memorandum with respect to the calculation of unconditional release dates for [12] the inmates affected by the *Bowden* decision. In that memorandum, Secretary Keller directed that "for each life sentence imposed for crimes during [the April 8, 1974—June 30, 1978,] time period the unconditional release date shall be calculated as 80 years minus applicable jail credit earned while the prisoner awaited convictions and sentencing." *See* Exhibit D, Affidavit of Alvin W. Keller, Jr.

15. Based on her date of arrest of September 2, 1975, Petitioner had as of December 7, 2009, accrued actual prison credit for time served in an amount of 12,515 days.

16. Pursuant to Secretary Keller's memorandum, the Department of Correction thereafter calculated Petitioner's unconditional release date, and applied Petitioner's credit for time actually served to her eighty-year sentence. As of the date of the entry of this Order, Petitioner's unconditional release date as posted on the "Offender Public Information" portion of the North Carolina Department of Correction website[13] is August 12, 2055.

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[13] *See* http://webapps6.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0049355&searchLastName=brown&

17. As of December 7, 2009, Petitioner had accrued credits for good time, gain time, and merit time during her incarceration based on her participation in work, study, or other programs in the following amounts:

Good time:	14103 days
Gain time:	2419 days
Merit time:	484 days

Petitioner has also accrued "penalty time" during her incarceration in the amount of 110 days, but has had eighty days of that time restored.[14]

[13]

18. There is no evidence that Petitioner accrued any good, gain, or merit time credits prior to her being resentenced to a sentence of life imprisonment on June 30, 1977.

19. The Department of Correction did not apply any of Petitioner's good time, gain time, and merit time

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searchFirstName=faye&listurl=pagelistoffendersearchresults&listpage=1

[14] At the evidentiary hearing in this case, Teresa O'Brien, an employee of the combined records section in the Department of Correction, testified that, with respect to the calculation of Petitioner's accrued credit, there was a mathematical adjustment that resulted in eleven days being subtracted from the total credit attributed to Petitioner. *See* Attachment Z, Affidavit of Teresa O'Brien (noting a negative eleven day credit under "other credits"). O'Brien testified that this adjustment was prompted by a change in the Department of Correction's recordkeeping system a number of years ago. While the Court does not conclude that this eleven day negative credit is meaningful given the calculation of earned time as a whole, the Court notes this additional fact for the record.

credits in the calculation of her unconditional release date.

20. Based on the calculations of the Department of Correction, if Petitioner's good time, gain time, and merit time credit as described in Finding of Fact No. 17 above were applied to her eighty-year sentence, Petitioner's calculated release date would be February 7, 2009.

CONCLUSIONS OF LAW

1. The Court has the requisite jurisdiction to address the matters contained in the Petition.

2. Petitioner has the burden of persuasion in a habeas proceeding in which she contends she is being illegally restrained. *See* N.C. Gen. Stat. § 17-3 ("Every person imprisoned or restrained of his liberty within this State ... may prosecute a writ of habeas corpus ... to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom." *See also, e.g., State v. Jones*, 113 N.C. 669, 671-72 (1893).

3. The North Carolina General Assembly has the power to define what a sentence of "life imprisonment" means. *See Bowden*, __ N.C. App. at __, slip op. at 7 ("[T]he Legislature merely defines the term of life imprisonment, which it has the authority to do. Our Legislature is granted the power and the authority to define crimes and set punishment for those crimes.") (citation omitted); *see also State v. Allen*, 346 N.C. 731, 737 (1997) (rejecting challenge to life imprisonment without parole statutes and concluding that "the General Assembly alone prescribes the maximum and minimum punishment which can be imposed on those convicted of crimes") (citing *State v. Perry*, 316 N.C. 87, 101 (1986)); *State v. Niccum*, 293 N.C. 276, 282-83 (1977)

(noting [14] that the General Assembly "provided that 'a sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison.'") (quoting 1973 N.C. Sess. Laws, ch. 1201, s. 6); 1973 N.C. Sess. Laws, ch. 1201 (entitled "AN ACT TO AMEND G.S. 14-17 MURDER DEFINED AND PUNISHMENT PROVIDED FOR MURDER, RAPE, BURGLARY, AND ARSON").

4. When Petitioner's life sentence was imposed in 1977, the governing law as enacted by the North Carolina General Assembly—N.C. Gen. Stat. § 14-2—mandated that Petitioner's "life sentence" was to be considered for all purposes a term of eighty years in the North Carolina Department of Correction. *See Bowden*, __ N.C. App. at __, slip op. at 7.

5. Respondents concede that sentence reduction credits would be used for all purposes, including the calculation of an unconditional release date, if Petitioner's sentence was the subject of a gubernatorial commutation to a specified term of years, or if Petitioner had originally been sentenced to a specified term of years. For the purposes of calculating an unconditional release date under North Carolina law, there is no legal basis to distinguish between a specified term of years as imposed pursuant to a gubernatorial commutation, a specified term of years as originally imposed by a court of competent jurisdiction, or a specified term of years imposed and as defined by North Carolina statute. The Court concludes as a matter of law that Petitioner's "life sentence" as defined by the North Carolina General Assembly has at all times since its imposition been a determinate sentence of eighty years in the State's prison.

6. At the time Petitioner's life sentence was imposed, the Department of Correction was obligated to calculate her sentence as an eighty-year term.

7. The Secretary of Correction has been given the authority and discretion under N.C. Gen. Stat. § 148-13 to issue regulations governing the award of good time, gain time, and merit time. The relevant version of § 148-13 in effect at the time the first set of regulations was adopted did not place any limitations on the Secretary's discretion in deciding how to award credits to inmates serving sentences for pre-Fair Sentencing crimes.

[15]

8. The Secretary of Correction did promulgate regulations as part of the Administrative Code (and later place into effect the internal "Policy and Procedure") in an exercise of his discretion pursuant to the authority set forth in N.C. Gen. Stat. § 148-13.

9. The regulations (and "Policy and Procedure") placed into effect by the Secretary of Correction pursuant to N.C. Gen. Stat. § 148-13 give the Department of Correction the discretion to award credits to inmates for good time, gain time, and merit time.

10. Based on the Department of Correction's regulations, policy, and procedure, and the conduct of Petitioner as demonstrated through the Department of Correction's records, Petitioner was in the class of inmates authorized to receive good time, gain time, and merit time credits. The Secretary of Correction appropriately awarded Petitioner with good time, gain time, and merit time credits in accordance with the Department of Correction regulations, policy, and procedure based on her conduct while incarcerated.

11. A reviewing court must give broad deference to an agency's interpretation of its own regulations. The agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation itself, and the reviewing court must defer to the agency's interpretation unless a different reading is compelled by the plain language of the regulation or other indications about the intent of the agency at the time of the promulgation of the regulation. *See, e.g., Morrell v. Flaherty*, 338 N.C. 230, 237-38 (1994), *cert. denied sub nom. Morrell v. Britt*, 515 U.S. 1122, 132 L. Ed. 2d 282 (1995).

12. There is nothing in any relevant provision of the North Carolina General Statutes, the North Carolina Administrative Code, the Department of Correction's "Policy and Procedure," or North Carolina case law precedent that specifically authorizes the Secretary of Correction to apply the good time, gain time, merit time, or any other awarded credits only for certain purposes and not for others. Just as the Court of Appeals concluded in *Bowden* that "we are not permitted to interpolate or superimpose provisions or limitations which are not contained in the text of the statute[,] *Bowden*, __ N.C. App. at __, slip op. at 6, this Court is not permitted to interpolate or superimpose **[16]** provisions or limitations that are not contained in the text of the statutes, the Department's own regulations, policy, or procedure, or any other legal authority.

13. The Court concludes that the Department of Correction's interpretation of its regulations regarding the award of sentence reduction credits is clearly erroneous, and that a different reading is compelled by the plain language of the regulations. The Department of Correction's historical policy of awarding good time, gain time, and merit time only for the purposes of pa-

role eligibility, custody determinations, and sentence commutation calculations is not authorized by North Carolina statute, by the regulations, policy, and procedure the Department of Correction itself placed into effect, or by any North Carolina case law precedent. While the Department of Correction does have the authority either to award or not to award sentence reduction credits, the Department of Correction does not have the discretion to award sentence reduction credits for certain purposes but to deny the use of the same sentence reduction credits for other purposes based on the regulations, policy, and procedure the Department itself put into effect. The North Carolina General Assembly could have enacted laws providing that sentence reduction credits were to be awarded only for the purposes of parole eligibility, custody determinations, and sentence commutation calculations and not for the calculation of an unconditional release date. It did not. The Department of Correction could have put into effect rules awarding sentence reduction credits only for the purposes of parole eligibility, custody determinations, and sentence commutation calculations and not for the calculation of an unconditional release date. It did not.[15]

14. Respondents contend that the decision of the North Carolina Court of Appeals in *Teasley v. Beck*, 155 N.C. App. 282 (2002), *disc. rev. denied*, 357 N.C. 169 (2003), is binding on this Court for the proposition that the Department of Correction has not exercised its discretion to promulgate regulations authorizing the award of sentence reduction credits to inmates serving

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[15] It is not lost on the Court that the Department of Correction currently calls good time, gain time, and merit time "sentence reduction credits" in its own 2007 "Policy and Procedure."

"life sentences," even if those "life sentences" are defined as eighty-year terms. *See Teasley*, 155 N.C. App. at 292 ("T]he Secretary has not ... exercised [his] authority under Section 148-13(b) to pass regulations for the application of good, gain, and meritorious time credits for those serving life sentences.") (citation omitted). The Court concludes as a matter of law that *Teasley* does not apply here. In *Teasley*, the Court of Appeals concluded that N.C. Gen. Stat. § 148-13(b) did [17] not mandate that sentence reduction credits be applied to the inmate's Fair Sentencing Class C life sentence for the purpose of calculating parole eligibility. *See Teasley*, 155 N.C. App. at 288 ("The paramount question remains: what, if any, is the effect of the "sentence reduction credit" regulations on plaintiffs' parole eligibility dates.") This case does not deal with parole eligibility in the context of an indeterminate Fair Sentencing life sentence, but rather the calculation of Petitioner's unconditional release date based on the determinate sentence imposed on Petitioner as defined by the General Assembly.

15. Counsel for Respondents also argued at the hearing on this matter that any ruling in favor of Petitioner could only spring from the Court's award of sentence reduction credits for the purpose of calculating Petitioner's unconditional release date. The Court is not awarding any sentence reduction credits to Petitioner in relation to her unconditional release date. The Department of Correction awarded the sentencing reduction credits to Petitioner pursuant to North Carolina statutory authority and the regulations, policy, and procedure the Department itself put into effect. The Court's role here is limited to interpreting whether the Department has acted in accordance with that statutory authority and the regulations, policy, and procedure the Department itself put into effect. The Court

concludes as a matter of the law that the Department has not done so.

16. Because Petitioner earned sentence reduction credits in accordance with Department of Correction regulations, policy, and procedure, she has a "liberty interest" in those credits that is subject to constitutional protection. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 558, 41 L. Ed. 2d 935, 952 (1974).

17. Because the Department of Correction's interpretation of its own regulations, policy, and procedure improperly denied Petitioner all the benefits associated with the sentencing reduction credits she earned, the Department of Correction's policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating an unconditional release date in the event of a gubernatorial commutation is a violation of Petitioner's due process rights under the United States Constitution.

18. Because the Department of Correction's interpretation of its own regulations, policy, and procedure improperly denied Petitioner all the benefits associated with the [18] sentencing reduction credits she earned, the Department of Correction's policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating an unconditional release date in the event of a gubernatorial commutation is a violation of Petitioner's rights under the "Law of the Land" Clause of the North Carolina Constitution, *see* N.C. Const., Art. I, § 19.

19. Because the Department admits that other inmates serving determinate sentences have been and are still awarded sentence reduction credits that apply

to their unconditional release dates, the Department of Correction's policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating unconditional release dates in the event of a gubernatorial commutation is a violation of Petitioner's equal protection rights under the United States Constitution.

20. Because the Department of Correction in fact awarded Petitioner sentence reduction credits in the form of good time, gain time, and merit time, Petitioner is entitled under the North Carolina General Statutes and the Department of Correction's regulations, policy, and procedure to have these credits deducted from her sentence for all purposes, including the calculation of an unconditional release date.

21. Given the application of the sentence reduction credits that Petitioner earned pursuant to the Department of Correction's regulations, policy, and procedure, and the earned prison credit for time she has served on her sentence, Petitioner's unconditional release date for the "life sentence" as defined by the North Carolina General Assembly in N.C. Gen. Stat. § 14-2 was February 7, 2009.

22. Petitioner has served the entirety of the "life sentence" imposed in her case.

23. Petitioner has carried her burden of proof showing that she is entitled to relief in this habeas petition.

[19]

CONCLUSION

Petitioner was convicted of first degree murder in connection with the cold-blooded killing of North Carolina State Highway Patrol Trooper Guy Thomas Davis,

Jr., and was eventually sentenced to life imprisonment for that killing. The Court has concluded as a matter of law that Petitioner has served the entirety of that life sentence as imposed in the Superior Court of Martin County, as defined and mandated by the North Carolina General Assembly, and as credited pursuant to the North Carolina Department of Correction's own regulations, policy, and procedure. Based on the foregoing, IT IS HEREBY ORDERED that the Petition for Habeas Corpus filed by Faye B. Brown is ALLOWED. IT IS FURTHER ORDERED that Petitioner Faye B. Brown is to be released unconditionally from the North Carolina Department of Correction no later than 5 p.m. today, December 14, 2009.

This Order is entered out of session with the prior consent of all parties as noted on the record at the hearing on this matter.

This, the 14th day of December, 2009.

/s/ Ripley E. Rand
Ripley E. Rand
Superior Court Judge

APPENDIX G

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF CLEVELAND	FILE NO. 76 CRS 2751
STATE OF NORTH CAROLINA V. WILBUR WILLIAM FOLSTON, JR.	AFFIDAVIT OF ALVIN W. KELLER

ALVIN W. KELLER, being first duly sworn, hereby deposes and says as follows:

1. I am an adult over the age of eighteen years, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this affidavit of my own free will, stating facts of which I have personal knowledge.

2. I am the Secretary of Correction, having been appointed to this office on 12 January 2009 by Governor Beverly Eaves Perdue. I have been a licensed attorney since 1975. Prior to assuming the position of Secretary, commencing in February 2005 I served as an Assistant Attorney General in the Capital Litigation Section of the North Carolina Attorney General's Office. Previous to my employment with the Attorney General, I was a Chief Circuit Military Judge for the Navy-Marine Corps Trial Judiciary for eight years. In that position, I presided over approximately 800 criminal trials.

From 1985 until 1996 I served as Staff Judge Advocate and Officer-in-Charge and was responsible for investigating and prosecuting criminal convictions.

3. By statute, the Secretary of Correction is the head of the Department of Correction. It is the statutory duty of the Department of Correction to provide the necessary custody, supervision, and treatment to control and rehabilitate criminal offenders and to reduce the rate and cost of crime and delinquency.

4. By statute, the functions of the Department of Correction comprise all functions of the executive branch of state government relating to corrections and rehabilitation of adult criminal offenders, including detention, parole, and aftercare supervision.

5. By statute, the Department of Correction includes the Post-Release Supervision and Parole Commission ("Parole Commission"), the Board of Correction, the Division of Prisons, and Community Corrections (formerly the Division of Adult Probation and Parole). The Parole Commission, however, is an independent agency placed administratively within the Department of Correction.

6. As Secretary of Correction, I have statutory control and custody of all prisoners serving sentence in the state prison system. Such prisoners are subject to all rules and regulations legally adopted for their governance.

7. Although the Secretary of Correction is the head of the Department of Correction, the Secretary has no authority in the matter of paroles or post-release supervision. Instead, plenary authority over paroles and post-release supervision is conferred by statute on the Parole Commission.

8. Since at least 1955, the Secretary of Correction has possessed statutory authority to establish rules and regulations or policies for the governance of the state prison system. More specifically, the Secretary has possessed authority to establish rules and regulations or policies as to grades of prisoners, rewards and privileges applicable to the classification of prisoners, and allowances of time for good behavior. Past Secretaries of Correction have from time to time exercised their discretionary authority to promulgate and revise such rules and regulations or policies.

9. The earliest codified regulations establishing credits for good behavior of which I am aware became effective 1 February 1976. A copy of the regulations is attached hereto as Exhibit A. Rule 2B.0101 (1976) establishes a method of computing good time for all prisoners, including Committed Youthful Offenders and those with life terms. By longstanding practice, the rule's reference to "inmates with life terms" has never been understood to require awards of good time for the purpose of unconditional release from prison of such inmates. The common understanding has been that life means life, and such inmates have never been given projected release dates. Rule 2B.0101 provides that good time is subject to forfeiture for misconduct as determined by disciplinary actions. The rate established is 8.94 days per 30.4 day month or 29.411 percent of total sentence length. Rule 2B.0102 establishes the application and rates of gain (then denominated "gained") time, which is not subject to forfeiture. In practice this rule has never been understood to require awards of gain time towards unconditional release of inmates with life sentences.

10. Although formal rules under an administrative code did not exist prior to 1976, Department records

establish that the Secretary's policy setting the good time rate, when applicable, prior to 1976 and pre-dating 1974, was the same 8.94 days per month that was adopted under Rule 2B.0101 in 1976.

11. By longstanding Department practice, purposes for which good and gain time credits could be applied were not the same for prisoners serving terms of years sentences and prisoners serving life sentences. More specifically, for those with life sentences, application of good time credits was limited to attaining prison privileges such as a more favorable custody grade, attaining parole eligibility, and reducing the time required to be served after commutation of a life sentence by the Governor. For such prisoners, gain time was applied only to reduce the time required to be served after commutation. The universal understanding within the Department was that the Secretary and Department had no ability or discretion to award good or gain time credits to be applied to calculate an unconditional release date for any prisoner with a life sentence.

12. Based on the longstanding Department practices relating to application of good and gain time and the lack of specific direction to Department employees to apply good time and gain time to life sentences for purposes of reducing the time required to be served, I have concluded that no Secretary before me has ever exercised statutory discretion to award good time and gain time for purposes of calculating unconditional release dates for life sentences. The good and gain time rules and policies were never read or intended to apply to life sentences. This is true for all life sentences, even though in *State v. Bowden* the courts have now determined that some life sentences must be treated as life sentences of 80 years. No doubt, no Secretary exercised this authority because they did not believe or un-

derstand that Section 14-2 (1974) provided an unconditional release date to which good and gain time credits could be applied.

13. Also as of 1 February 1976, Department regulations existed governing application of good time credits to custody promotions. Attached hereto as Exhibit B is a copy of Rule 2C.0503 with amendments effective 1 August 1983. Rule 2C.0503(b) governs promotion to minimum custody, the least restrictive custody grade. An inmate could not be considered for promotion to minimum custody until he or she was within 48 months of a prospective release date. For inmates with life sentences, the parole eligibility date functioned as a hypothetical prospective release date. For purposes of calculating when custody promotion could occur, Rule 2C.0503(b)(1) treated a life sentence as a sentence of 80 years. Department records confirm that the 1976 rule adopted Department practice existing prior to 1976 and predating 1974.

14. Department records establish that the good-time rate of 8.94 days per month (30%) remained in effect until 31 January 1982. Effective 1 February 1982 through 31 March 1983, the rate was 12 days per month (40%). On 1 April 1983, the rate was increased to 15 days per month (50%). Attached hereto as Exhibit C is a copy of Rule 2B.0102(a), showing the last increase.

15. Notwithstanding increases in the good-time rate, the Department's reading of its rules and Departmental practice always has remained the same for all prisoners with life sentences imposed for crimes committed before 1 July 1981. I requested Department and Combined Records Section staff to determine whether, at any time in the past, such prisoners with life sentences received good time or gain time for any

purposes other than custody promotion, attainment of parole eligibility, or commutations. Based on their examination of Department records, it is clear that good and gain time credits have never been applied to calculate an unconditional release date for any inmate with a life sentence imposed for a crime committed before 1 July 1981, which includes the *Bowden* group of inmates. Again, this is no doubt because of the universal understanding within the Department that good time credits could not be applied to life sentences for purposes other than more favorable custody grade or parole eligibility and commutations and gain time credits could not be applied except in commutations.

16. Our appellate courts have now held that under former Section 14-2, effective 8 April 1974 through 30 June 1978, a sentence of life imprisonment imposed for a crime committed during that time period must be treated as a sentence of life imprisonment for a term of 80 years and that the Secretary must use this term for applying jail credits and to calculate a release date. Nevertheless, the relevant judgments imposing life sentences have never been amended.

17. The discretionary authority of the Secretary of Correction in the matter of good and gain time credits preceded, continued during, and followed the period from 8 April 1974 through 30 June 1978. During that time period, no Secretary of Correction promulgated any policies or rules providing good or gain time credits for any criminal offenders with life sentences other than for the specific purposes shown hereinabove. No Secretary directed that such credits be provided in any other way. The *Bowden* decision does not affect the Secretary's sole discretionary authority in the matter of applying good or gain time credits to life sentences.

18. The Fair Sentencing Act, N.C. Gen. Stat. 15A-1340.1 et seq. (1981) ("FSA"), changed the Secretary of Correction's authority in the matter of good and gain time credits for criminal offenses governed thereby. The FSA divided felonies into letter categories A through J. The FSA's day-for-day good time credits applied prospectively to sentencing of all persons, other than Class A and Class B felons, who committed felonies on and after 1 July 1981. For prisoners convicted of felonies other than in Classes A, B, and C, FSA Section 15A-1340.7(b) provided day-for-day good time to reduce the amount of time required to be served before unconditional release from prison.

19. Under the FSA, Class A felons were those who received death or life sentences. Class B felons were those who received life sentences. Also under the FSA, a Class C felon could receive either a sentence of up to 50 years or a life sentence. Class C felons with life sentences could not receive day-for-day good time under Section 15A-1340.7(b). Instead, they were made subject to the discretionary authority granted to the Secretary of Correction in Section 148-13(b).

20. Revisions made to Section 148-13 with enactment of the FSA continued the Secretary of Correction's sole discretion to give good behavior credits for prisoners with sentences for offenses committed before 1 July 1981. However, revised Section 148-13(b) also gave the Secretary discretion to award good behavior credits for prisoners with Class C life sentences under the Fair Sentencing Act. For both groups of prisoners, including prisoners with life sentences based on convictions in the period from 1974 to 1978, the Department continued its practice of allowing good time credits only for purposes of custody classification, parole, or commutation and gain time credits only in commutations.

Department records confirm that no Secretary exercised discretion to award such credits to prisoners with life sentences except for those limited purposes. Again, this appears to be because no Secretary thought he had the ability or discretion to award such credits to reduce life sentences in any other way.

21. In December 1995 the legislature exempted the Department of Correction, as to only prisoners, probationers, and parolees, from the rule-making provisions of the Administrative Procedure Act. Thereafter, the Department's policies and practices as to Class C life sentences were challenged in *Teasley v. Beck*, 155 N.C. App. 282, 574 S.E.2d 137 (2002), *discretionary review denied*, 357 N.C. 169, 581 S.E.2d 755 (2003). The Court of Appeals concluded that the Department's existing sentence credit policies did not apply to prisoners with life sentences.

22. After the decision in *Teasley*, no Secretary of Correction has exercised his discretion to promulgate policies allowing good or gain time credits to reduce the terms of prisoners with life sentences. This includes prisoners with Fair Sentencing Act Class C life sentences and those with life sentences under prior sentencing laws. The Department's policy and practice of awarding good time credits to prisoners with life sentences only for purposes of attaining a more favorable custody grade or parole eligibility and commutations and gain time credits only in commutations has never changed. Based on Department records, no prisoner with a life sentence has ever been unconditionally released by the Department.

23. Pursuant to the decision in *Bowden*, prisoners with life sentences for crimes committed between 8 April 1974 and 30 June 1978 now must be treated as

having a statutory life sentence of 80 years. However, judgments from the courts imposing life sentences and have never been amended. In compliance with the *Bowden* decision, I have directed the Combined Records Section to calculate unconditional release dates for prisoners with statutory life 80-year sentences for crimes committed between 8 April 1974 and 30 June 1978.

24. For each life sentence imposed for crimes during this time period the unconditional release date shall be calculated as 80 years minus jail credit. My directive to the Combined Records Section is attached hereto as Exhibit D.

25. By statute, only the Secretary of Correction possesses the discretionary authority to promulgate policies awarding good time credits for prisoners serving statutory life 80-year sentences. In the exercise of that discretion, I have determined, in accordance with universally understood Department practices, that prisoners serving such life sentences will not receive good time credits for the purpose of reducing the amount of time required to be served before unconditional release from prison.

26. I will continue the Department's longstanding practice and understanding of its rules and policies as to life sentences before 1 July 1981 whereby good time credits always have been applied for the limited purposes of attaining a more favorable custody grade, attaining parole eligibility, or commutation and gain time has been applied in commutations only. The Department will engage in appropriate policy making procedures to assure that it continues to treat inmates with life terms consistent with my directive.

27. By statute, the Secretary still possesses plenary authority in the matter of good behavior credits for prisoners with life sentences imposed for crimes committed before 1 July 1981. The *Bowden* decision does not affect this authority of the Secretary. However, a future Secretary of Correction could decide to exercise this discretion differently. Accordingly, it is appropriate for me to comment on the rationale for my decision. Although I did not rely solely on the Fair Sentencing Act in reaching my decision, I found persuasive those FSA provisions excluding Class A and B felons from receiving good and gain time credits for purposes of unconditional release from prison. I cannot see any meaningful difference between prisoners with statutory life sentences of 80 years, who in some cases at first received death sentences, and FSA Class A and B felons in that their crimes are similarly heinous. Also, the crimes of pre-FSA prisoners with life sentences and Class C life sentences under the FSA were sufficiently serious that life sentences were imposed by the juries and judges of this State. Further, all prisoners with life sentences imposed under prior sentencing laws should be treated somewhat similarly. The group of prisoners with statutory life 80-year sentences will have unconditional release dates, but those dates will not be reduced by good and gain time credits for purposes of unconditional and unsupervised release from prison. No inmate with a life sentence has ever been unconditionally released by the Department. Given the high success rate of prisoners with life sentences released under parole supervision, I wish to continue the good public policy in North Carolina that prisoners with life sentences may be released only under parole supervision.

Further affiant sayeth not.

This the 17th day of November, 2009.

/s/ Alvin W. Keller, Jr.
Alvin W. Keller, Jr., Affiant

Sworn to and subscribed before me,
this the 17th day of November, 2009.

/s/ Lorraine M. Dulin
Notary Public
My Commission Expires: 4/3/2010

stamp:
LORRAINE M. DULIN
NOTARY PUBLIC
WAKE COUNTY, N.C.
My Commission Expires 4-3-2010.

APPENDIX H

[seal]

NORTH CAROLINA DEPARTMENT OF CORRECTION

214 West Jones Street • 4201 MSC • Raleigh, North Carolina 27699-4201
Phone: (919) 716-3700 • Fax: (919) 716-3794

Beverly Eaves Perdue
Governor

Alvin W. Keller, Jr.
Secretary

MEMORANDUM

TO: Jennie Lancaster, Chief Deputy Secretary

FROM: Alvin W. Keller, Jr. /s/

RE; Implementation of Calculation of Unconditional Release Dates

DATE: November 10, 2009

As you are aware the appellate courts of North Carolina have ruled that pursuant to North Carolina General Statutes, Section 14-2, unconditional release dates must be calculated for those prisoners sentenced to life imprisonment for crimes committed between April 8, 1974 and June 30, 1978. For this group of offenders, Department records currently show release dates of "life" or 9999 or the like, reflecting that no unconditional release date has been calculated. These life sentences must now be treated as statutory life sentences of 80 years. Therefore, I am directing for each life sentence imposed for crimes during this time period the unconditional release date shall be calculated as 80 years minus applicable jail credit earned while the prisoner awaited conviction and sentencing. I am also directing that these sentence calculations be completed by MIS and Combined Records as soon as possible and

that I be advised when the calculations have been completed.

AWKjr/jk

cc: James French
Tracy Little
Frank Rogers
Keith Acree
Lavee Hamer

APPENDIX I

TESTIMONY OF ALVIN KELLER, Dec. 9, 2009 (excerpt)

[11] ALVIN KELLER, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS ON DIRECT EXAMINATION BY MR. BARFIELD:

Q. Mr. Keller, if you would identify yourself for the record, sir?

A. I'm Alvin Keller, the Secretary of Correction in North Carolina.

Q. And when did you become the Secretary of Correction, Mr. Keller?

A. January of 2009.

Q. How did you become the Secretary of Correction, Mr. Keller?

A. Appointed by Governor Perdue.

Q. And is it correct that you serve at her pleasure?

A. That's absolute (sic) correct.

Q. And is it correct that you're subject to removal at her displeasure?

A. That's absolute correct. I serve at her pleasure.

[12]

Q. Now, do you have any prior service with the North Carolina Department of Correction?

A. No.

Q. Do you have any prior experience in corrections of any kind?

A. No.

Q. What is your background and your training, sir?

A. Okay. I'm—One, I'm a lawyer. I served 30 years in the Marine Corps. I retired as a Marine Colonel. I served as a Judge Advocate during that time. I served both as a defense counsel, prosecutor in my earlier years, as a Staff Judge Advocate in my mid and the later part of my career. And when I say Staff Judge Advocate, it means that I was responsible for law centers within the Marine Corps.

As Officer in Charge at Camp Lejeune, I was in charge of one of the two largest law centers in the Department of Defense.

From 1996 to 2004, I served as the Chief Circuit Military Judge, which meant that, for—in the Marine Corps, both on the west coast at Camp Pendleton, in Okinawa, and also at Camp Lejeune.

Q. And did you thereafter serve in the—

[13]

A. That's correct.

Q. —as a private—

A. When I—

Q. —a civil practice?

A. Right. When I retired from the—After retiring from the Marine Corps, I served four years in the Attorney General's office working in the Criminal Division, specifically dealing with capital litigation cases.

Q. And in that service, were you in fact a litigator? You went to court—

A. Yes.

Q. —filed briefs and memorandums and so forth?

A. Yes.

Q. And so you're familiar, I take it, with the term stare decisis, of what a legal precedent would be?

A. Yes.

Q. Are you familiar with the litigation in *State versus Bowden*?

A. Yes.

Q. When did you first become aware of that piece?

A. First became aware of it, that's difficult to say. I specifically became aware of it certainly during—after I was appointed to this job.

Q. Let me ask you that. Can you—*State versus* [14] *Bowden*, it was decided initially by the Court of Appeals in, I believe, November of 2008. And you were appointed the Secretary of Correction in 2009—

A. Correct.

Q. After you became the Secretary of Correction, did you then become aware of the case while it was still pending in the Supreme Court?

A. I'm quite sure that—Yes, yes.

Q. In terms of your awareness, did you review the case while it was still in the Supreme Court?

A. Did I review it while it was—I was briefed on it, yes.

Q. And did you meet with and communicate with State's attorneys who were representing the State in the case?

A. While it was in the Supreme Court?

Q. Yes, sir.

A. I'm trying to—I really don't recall when it was argued before the Supreme Court to be quite honest with you. Do you recall—Do you recall when it was argued?

Q. Unfortunately, I was not at all involved in—at that time.

A. Okay.

Q. Let me ask you this way, Secretary Keller. Did **[15]** you understand before *Bowden* was decided by the Supreme Court, that is, when it was sent back down to the Court of Appeals, did you know before that time that the issue in *Bowden* was whether or not Mr. Bowden would be eligible for these sentence reduction credits?

A. Okay. It's my understanding that the—that the issue that—that the Court was—Are we talking about the Supreme Court or—

Q. Well, what—At that stage of the game, what did you think the issue was in *Bowden*?

A. I think the issue was whether or not the, I believe it was 14-2 required an inmate's sentence to life to serve in a sentence of 80 years. In other words, did a life sentence, in effect, mean 80 years? I believe that was the issue.

Q. Well, in Mr. Bowden's case, isn't it true that the only credits against his sentence that were actually

contested by the Department of Correction would be good time, gain time, merit time credits that would be used to reduce an 80-year sentence?

A. To be quite honest with you, I don't believe the issue regarding how gain time—or rather, how good time particularly—I don't believe that the issue of good time was addressed either by the Court of Appeals or by the Supreme Court.

[16]

Q. Well, do you understand that, if the position that the State advances in this case today were to be correct or accepted by the Courts, that that would have rendered everything in Bobby Bowden's case moot? That is, it would mean that there would be nothing for them to have been arguing about?

Ms. Smiley: Your Honor, I am going to object. Although Mr. Keller has a stellar legal career, he is here as the Secretary of Correction, not as an attorney. His record as a Secretary has—

The Court: Sustained as to the question calling for a legal conclusion. Ask your next question, Mr. Barfield.

Q. You heard, Secretary Keller, the statements that I read out of the Bobby Bowden record a few minutes ago?

A. (No Response.)

[17]

Mr. Barfield: Let me—Judge, if I may approach. This is a copy of what I handed up.

The Court: You may.

Q. Now, Mr. Keller, I've got a copy here of a document I want you to look at. And you see there that it is—

The Court: Which exhibit are we talking about?

Mr. Barfield: Judge, this is Exhibit Three. It's a portion of the State's Petition for Discretionary Review.

The Court: Okay.

Q. Do you recognize that that is a Petition for Discretionary Review to the Supreme Court?

A. Yes.

Q. And you've seen those before, haven't you?

A. Yes.

Q. Okay. Now, I'm going to turn over here to page four and ask you just to read this first paragraph.

A. (Reading.) Review by this Court is needed because the Court of Appeals erroneously decided a life sentence does not mean life in prison with only the possibility of commutation, pardon, or parole. Instead, unconditional release from prison, that is, release without any supervision, is now mandated for certain offenders who commit heinous crimes.

Q. Okay. Turn over to page—I think that would be page nine, Miss Farber?

Ms. Farber: Seven?

Q. I want you to look at this section of it and read me this last sentence in that middle paragraph right there, starting with "As explained".

A. (Reading.) As explained above, the Department [18] of Corrections could not—could not decline to apply to the other inmates similarly situated and a public decision that unconditional release is mandated.

Q. Now, do you know where the State's lawyer got the information that would lead the State's lawyer to make a representation to the Supreme Court that, if it upheld the Court of Appeals decision, that these persons' unconditional release would be mandated?

A. You're asking the wrong person for that.

Q. Did you have any communication at all with the State's lawyers in the course of—of any part of the game?

A. Well, I certainly didn't get that type of—They certainly never said that.

Q. Well, after the Supreme Court left undisturbed the ruling by the Court of Appeals at *Bowden*, if you would, explain how that came to your attention that that had occurred, that is, the Supreme Court had decided that—they decided that discretionary review was improperly provided and they let stand the Court of Appeals' decision. How did you find that out?

A. As you—As previously admitted—mentioned in, I believe it was back in October of 2008, the Court of Appeals rendered its decision in—*Bowden*. And I believe the Court's decision basically indicated that an [19] individual who had received a life sentence, I believe, between 1974 and 1978, I won't mention the months.

Q. Yes, sir.

A. I think we're—I've got them correct about the —about the years. That if he or she received a life sen-

tence during that period of time that that life—that that sentence was to—should be treated equivalent of 80 years of confinement.

I believe the State then, after the decision was rendered, asked for a discretionary review, the matter went to the Supreme Court. As you indicated, the Supreme Court decided that it would not hear the—hear the issue.

At that particular—at that moment, the Department was then faced with two choices, basically. In fact, it had two things that it had to deal with. Two tracks it had to deal with.

Q. If I—And I'll interrupt you there because I'm going to get to that point. But how did you find out about the Supreme Court's decision.

A. I'm quite sure—

Q. Was it a phone call, or?

A. Well, I'm quite sure that my—my general counsel was the first person who probably contacted me on it. I'm quite sure that I was also contacted by the [20] Department of Justice. But I got the information.

Q. When you got that information, did you believe at that time that the regulations and policies that had been promulgated by past Secretaries of Correction regarding sentence reduction credits for pre-Fair Sentencing Act inmates who were serving terms of years now applied to the *Bowden* class?

A. No. What I did was, after the decision—after I was briefed on the decision, I at that moment inquired as to how inmates who had received life sentences had been treated in the past, not only the—the *Bowden*

type of life sentences, but all inmates who had received sentences.

Q. When you say you made that inquiry as to how they'd been treated in the past, did you do that prior to taking any action at all with regards to how the *Bowden* class inmates would be treated?

A. Both were being done at the same time. We were working both issues. Okay? At the same—

Q. When you say both issues, would it be correct, Secretary, that, once the decision was rendered by the Supreme Court, that, in fact, you put in place a plan to release the *Bowden* class inmates, including Mr. Jones?

A. Then let me—If you don't mind, let me go back to—to explaining exactly what was taking—what [21] was taking—taking place.

When the decision was rendered, I was briefed on the decision. What we considered—What I was also briefed on was whether it—was on this issue of whether or not the Secretaries, the past Secretaries, had exercised their discretion, and how they had exercised their discretion with regard to inmates who had received life sentences.

What I was told was that they believed that no inmate who had received a life sentence had ever been released from a confinement facility in North Carolina unsupervised. So, that was the—that was the legal issue that we—that we were addressing.

On the second track, or second issue if you want to refer to it, we also had to consider the fact that the Court's decision had been rendered in early October and that the Supreme Court mandate would be issued 20 days away, which would have been about the 29th of October.

So that's how that date became extremely relevant to the—to the Department. Of course, that—that meant that there certainly was the possibility that the Department would be ordered to release the *Bowden* type of inmates.

That being said, it would have been derelict [22] for the—for the Department to just sit mute. That being said, the Department made contact with those *Bowden* type of inmates to one, try and determine where they would reside if in fact they were released on the 29th. Once they got that type of information, contacts were made with local law enforcement to let those folks know that there was the potential that these individuals would be coming to their communities.

We also had a responsibility to try and contact victims of these *Bowden* type of inmates. And you need to keep in mind that some of those—some of those victims were children at the time that—that offenses occurred. And some had moved out of state. But, nevertheless, we felt that we had a responsibility to try and contact those folks also to let them know that that was—there was the possibility that these folks would be released on the—on the 29th.

Now, we also contacted our probation officers in those counties where we believed these inmates would —could potentially go if released. And the reason for contacting those probation officers was to have a point of contact so that, if this individual was in fact released, he would have some contact, some person that he could talk to to try and get him or her successfully through this—through this release—release period.

[23]

So we're trying to do that in every—in every case. And, as I indicated, I believe that we would have been derelict if we had not taken that—taken those steps because there was surely the potential that the Court could have ordered us to—to release those—those inmates.

Now, in the second track, we were taking—were obviously working with the Attorney General's office to try and get this issue regarding the Secretary's discretion with regard to good time. That is, whether or not the Secretary legally had—still had the authority to determine how good time would be applied to inmates, not only the *Bowden* type of inmates, but any inmate, including those with life sentences.

So again, we were working on two tracks after the Supreme Court's decision. One was the legal track, the other one was the—was the track to try—was clearly the—the public safety track to try and get information to law enforcement, to get information to victims.

And two, to try and get it—to try and put something in place that would help the inmate also. Because, if this individual's going to be released unsupervised, we were going to try and take every step that we could take to ensure that he did not return to us [24] with another victim. That was the bottom—was the bottom line here.

And I'd like to also note that I took into consideration that, since 1995 to 2008, when you look at the 600 or so inmates who had received life sentences and were released during that period of time, those individuals all being released on—on parole, only—I believe it's a little less than eight percent of those individuals returned

to our confinement facilities. So, in other words, 92 percent of the folks who—of that 600 folks who had been released under supervision did quite well.

And, to be quite honest with you, we would have liked to have seen the *Bowden* folks leave under those circumstances, too. I believe that that was a public safety matter also.

Q. And I'm going to try to get—make my questions fairly discrete, Secretary Keller, so that we can maybe get some specific answers. So, did you in fact order the release, that is, the calculation of unconditional release dates—

A. I didn't hear the question.

Q. Did you, at some point between October 9th and October 23rd, issue an order that the unconditional release dates for the *Bowden* class, including Mr. Jones, [25] were to be calculated, giving them credit for good time, gain time, and merit time, just as every other prisoner serving a term of years would get credit? And that, as to those who had—who had, by that calculation, maxed out their sentence, did you order their release?

A. I never ordered anyone's release. And two, I—what we did do was we asked our Combined Records folks and our information folks to do—to run test runs on each of the *Bowden* type of inmates. But those were strictly test runs. We never—I never ordered the release of anybody.

Q. Well, did you or someone working under your command or supervision actually prepare release papers, take them to inmates, and have them sign the release papers?

A. I've—What—

Q. Did they do that or did they not?

Ms. Smiley: Excuse me. Your Honor, he's answering the question.

Mr. Barfield: No. Judge, I'm afraid I think he's not.

The Court: Well, he wasn't given the opportunity to, so I'll let you ask the question again and then he'll be given the opportunity to answer.

Mr. Barfield: All right.

[26]

The Court: Okay.

Q. Did any correctional employee working under your supervision or direction or in your chain of command in fact prepare release papers in the usual and normal fashion for someone being released after serving his sentence, take them to the *Bowden* class prisoners, specifically Mr. Jones, and have him sign those papers just as if the decision had been made for him to be released?

A. Well, obviously, I wasn't with the every—with every Superintendent. I can tell you the information that—the guise that was given. The guise given was to—was in fact to make contact with each of the *Bowden* type of inmates as I've indicated earlier.

One, we wanted to know where did they intend to—where did they intend to—intend to go. And they certainly were advised that there was the possibility that they would be released on the 29th, just as—just as we advised the law enforcement, just as we advised family and—rather, victims.

But clearly, I never told anybody that—that the *Bowden* type of inmates were going to be released on the 29th. I mean, short of a court order, no. They weren't going to be released and everybody—each one —In fact, that was one of the reasons why we had the [27] Superintendents to talk to these—to these individuals because we wanted to make sure that there wasn't going to be any—any issues in that—in that regard.

So, I believe that they were all told that there was the possibility that it would occur on the 29th, but no one told them that definitely they were going to be released on the 29th of October.

Q. So, it's your testimony that when the communications came from the Department of Correction, whether it went to Superintendents, law enforcement, victims, the media, the Governor's office, are you saying that your communications were always that there was a possibility and that you never represented to the press or to any other person that it was a decided issue and that they were going to be released?

A. That's correct. I never said that—that these inmates would be released on the 29th. It was clear that that was a possibility. That the Court might very well—that some Court may very well have ordered that to—to take place.

Q. Why would it have been a possibility as of the 29th?

A. As I indicated earlier, the Supreme Court mandate was issued—rather, the mandate of the Supreme Court would have issued on the 29th of October.

[28]

Q. The Court decision on the 29th, that mandate, the 29th would be the first day, would it not, that the *Bowden* decision would become a final decision of the Courts?

A. That's correct.

Q. And so, for prisoners to be released on the 29th, it would have had to have been by the mere application of *Bowden*, not by any order from any other Court. Is that correct?

A. Well, that—that would have been the—the 29th obviously would have been the date that the—that the Court of Appeals' decision would have—would have, in effect, stood. So we had to—there was a date that we had to use. The 29th was—was the date that we—that we used. I suppose we could have said that the Court would have given us some grace period and picked the 30th or the first of the month, but the 29th seemed to be a reasonable date to—date to use.

Again—Again, we had a public safety issue here and we needed to contact law enforcement, again we needed to contact the victims and then, too, we needed to work with—with our inmates who were going to be released unsupervised.

And let's not forget the fact that the majority of these folks in this *Bowden* category had already come [29] up for parole eligibility and had had their cases heard, but had not been granted parole.

Q. You mentioned public safety a couple of times. Mr. Alford Jones, are you familiar with his record in the Department of Correction?

A. I'm familiar with Jones. I—What's the question?

Q. Well, are you familiar with the fact that he's been a minimum custody prisoner since, I believe, 1993.

A. That's correct. In fact, there—there are a number of individuals, I believe, who fall within this *Bowden* category of individuals who are eligible for parole. In fact, I believe—I believe that—

Q. So you—

A. Well, in other words, what I'm saying is that we have some—some of the *Bowden* individuals are on mapped programs. In other words, that's the agreement between the inmate, the Department of Correction and the Parole Board.

So, yes, there are—A number of these individuals are in that category, so they too could—could potentially later receive parole.

But—and as I indicated earlier, folks who do receive parole do quite well when they're—when they are released. And we really think that that's the way **[30]** that it should be—should be done. That we should not be putting these folks back on the street without any form of supervision.

Q. And again, with regard to public safety, are you aware that Mr. Jones, until he was hurt on a job incident, had been on work release? That is, allowed to go outside the prison, into the public, without any direct supervision, and work, and then come back to the prison. And was allowed to, you know, report himself back to the prison.

A. As is true for a number of—a number of—of inmates, including folks who fall outside the *Bowden*

group of—group of inmates. That—That's correct. That's part—That's part of that long process of looking at individuals.

That—Those are the type things that the—that are included as part of this map agreement that the Parole Board expects that inmate to participate in, to show that he or she has the capability of doing well once they—once they are—once they are released. But we rely upon the judgment of the Parole Board to release those individuals.

And, as I've indicated earlier, the folks that they have released have done quite well. To have only—less than eight percent of the individuals return to— [31] to confinement after being paroled, I think speaks quite highly of the process.

Q. And, of course, Mr. Jones here is actually scheduled to be paroled June of 2010. Is that right?

A. I believe that's correct. If—If he completes the map program.

Q. Now, with regard to the—

A. And—And you mentioned the fact that—that he had gone out to—that he had been working. And I think you are also aware that—that he was fired from that job.

Q. Actually, I'm not. I'm aware that he was there after given passes to go out in the community—

A. Well.

Q. —on furloughs and that sort of thing.

A. Well—

Q. And are you aware that he's completing his map contract?

Ms. Smiley: Your Honor, there are about three questions there. I would object.

The Court: One question at the time.

Q. Okay. Are you aware that he was, nonetheless, allowed furloughs to go out in the community?

A. That would not surprise me. But—But the point is, is that, if we're going to talk about this, [32] we're going to make sure that we put it all on the—all on the—all on the record.

The point is, is that he still has his map agreement at this—at this point. But he obviously—he's got to find employment to—to satisfy that element of the map agreement.

The Court: I don't think his parole eligibility is necessarily an element to where we are, so let's move on to something else.

Mr. Barfield: I would agree, Your Honor.

Q. Mr. Keller, sometime in November, I think it was around November 17th, did you send a memo out to other folks in the prison system explaining to them how the *Bowden* class would be dealt with, with regards to sentence reduction credits?

A. That's correct.

Q. Now, prior to that memo, had you sent any memorandum or any kind of written direction of any kind to any other employee or official with the Department of Correction regarding the same subject?

A. No.

Q. Did you have communications with the Governor's office sometime after the—the decision was made

final in *Bowden* and the date on which you sent out that memorandum?

[33]

A. I have—I've been in constant contact with our general counsel, yes.

Q. Isn't it true that, in the first several weeks after the *Bowden* decision was—or, the Supreme Court ruled in *Bowden*, that you and others represented to the public that the *Bowden* decision would result in these—these inmates being released, that they would get the sentence reduction credits and that there wasn't anything that the Department of Correction could then do about it?

A. I never said that. I never directed anybody to say that.

Q. Okay. Well, you—Or, would you at least be aware that the Governor of the State issued statements saying that that was the case?

A. Well, I'm going to leave that up to—leave that up to you.

Q. Well, I'm just asking you if you're aware of it, sir?

A. I haven't heard—I'm aware that the Governor has—has commented on the *Bowden* issue. That's correct.

Q. Are you aware that, between October 9th and October 23rd, the Governor, on her website, actually posted a list of the *Bowden* prisoners, pictures of the *Bowden* prisoners, with statements indicating that those [34] prisoners were in fact going to be released, and without any reference to it being a possibility?

A. On the 9th, possibility. I'm—I'm aware that there were—that the—that the photographs were on the—were on the website. With regard to it being a definite that these—that the inmates were going to be released, I don't believe that I saw that. In fact, I know I didn't see—didn't see that.

And, from my—from what I've heard, either from the television or from—from the interviews, I believe that the Governor is of the opinion that the—that the inmates should not be—should not be released. So I'm not sure why she would be saying that they're—they were going to be. Rather, that it was definite that they were going to be released on the 29th. So—

Q. Well now, the Department of Correction releases inmates who have either Fair Sentencing or pre-Fair Sentencing sentences or cases without being on parole if they, what we call "max out" their sentence. Is that right?

A. Well, if you'll ask the question again, please?

Q. Well, let's just take somebody who was sentenced in 1975 to two consecutive 40-year terms for armed robbery, so they got 80 years of sentences. Now, you would agree that that person, while they had been **[35]** incarcerated, would be getting credit, sentence reduction credits, for good time, gain time, and merit time?

A. Yeah. I think that, if I'm hearing you correctly, we're talking about how the Secretary—how the Secretary had exercised his discretion with regard to—to good time. Is—Is that what we're talking about?

Q. I'm just asking you if that person, serving a sentence beginning in 1975, of 40 plus 40, an 80-year sentence for two counts of armed robbery, would that

person in your knowledge be getting awarded sentence reduction credits, starting with good time, and including gain and merit time?

A. I think that that's a possibility, yes.

Q. Is it a possibility—

A. Yeah.

Q. —or is it correct?

A. Well, I think that that's a possibility. I mean, obviously, there are a lot of factors that would go into that. But that—So, yes. I think that that's a possibility that he would be getting his good time.

Q. Okay. Well, what would be some factor other than the fact that he was sentenced to a term of years?

A. What—What would be—There again, his conduct would—would affect how he or she got good time.

[36]

Q. Well, he—

A. Whether or not—How the—the Secretary decided that he was going to exercise his discretion with regard to how good time would be applied would factor in.

But—But to answer your question, as I said earlier, yes. I believe that he probably would have been getting good time.

Q. Okay.

A. Okay

Q. And then that person could, in fact, then max out their sentence? That is, fully serve their sentence in something less than a total of 40 years. Is that right?

A. I believe that's correct.

Q. Now, the Department of Correction in that case would release that person. Would it not, if they maxed out their sentence?

A. If he or she maxed out their—maxed out their sentence, I would think so, yes.

Q. Now, it would do that, would it not, even if the Governor didn't like the idea?

A. Well, that's absolutely correct.

Q. Because it would have to, whether the Governor liked it or not?

A. That's absolutely correct.

[37]

Q. Okay. So in this case, the fact that the Governor didn't like the idea wasn't really relevant to your decision-making. Was it?

A. You got that right. Yes.

Q. So you would—you would, I guess, testify that you didn't do or take any action or fail to take any action on the basis of the Governor in fact being displeased and directing you to take some action or fail to take some action?

A. That's correct.

Q. Did you have any conversation with the Governor's office during this period of time when you were deciding what action to take? That is, the period of time between October 9th and October 29th?

A. Okay. I believe the last time that I had—had direct contact with the—with the Governor was last—we had a cabinet meeting and I told her that we were

getting ready at that time to—I believe it was the *Folston* case, we were getting ready to—to go to Western North Carolina to deal with the—the *Folston* issues.

Q. The time frame I'm talking about would be before *Folston*. I'm talking about the time frame between October ninth and the time that you decided that the *Bowden* class inmates would be handled in the way you [38] describe in your November memo.

A. Let me just answer this. The Governor has not given me any directions on how to exercise my discretion.

Q. All right. Now, with regard to—You mentioned that previous Secretaries of Correction had exercised discretion. That is, that they had issued various and sundry regulations that would apply to or direct the Department of Correction as to how to calculate, award, apply, use sentence reduction credits of various kinds?

A. I believe that what the records reflect is, is that —that from, I believe, the last 55 years, no Secretary has ever exercised his discretion with regard to good time to adjust a release date for an inmate who had received a life sentence.

Now, he—The records will reflect that—that good time had been used by those—had been used to provide the—an inmate, even with a life sentence, they—well, particularly individuals with a life sentence, had been used to one, determine an eligibility for parole, the date for parole. It had been used to allow a custody determination to be made, that is, close, medium, minimum.

It also was calculated in a county for the case where that sentence could potentially be commuted, or

[39] commutated by—by the Governor, and then the—the good time would apply at that point.

Q. Let me just follow that point. You would agree that, if the Governor commuted a sentence to a term of 80 years in the State's prison, that that sentence, that inmate previously sentence to life under G.S. §14-2, would be given all of those good time, gain time, and merit time credits and their sentence would be reduced with those credits?

A. I think that that—I think that that's a distinct possibility. And for that reason, I also went back to look to see how Governors who had been requested to commute sentence, life sentences, to a term of—a term of years.

And, from what I have discovered, if the Governor decided that he was going to commute that—offer the commutation, it was only brought down to the point where the individual would have been eligible for parole. In other words, gave him an eligibility for parole date. And it may very well have been in this case that specifically had—had indicated that Governors have specifically indicated in a number of cases that, if—when the individual made their request for commutation, that he already had an eligibility for parole date and, therefore, the commutation in their mind [40] was not—was not relevant.

So the Governors historically, from what—from what I can determine also wanted to make sure that no inmate who had received a life sentence ever left the facilities unsupervised. And that's the bottom line.

Q. Mr. Keller, you agree that the Governor has the power under our Constitution to commute a life sentence to a sentence of a term of years?

A. I think that that's probably correct.

Q. And you kept these—

A. Now, that's my opinion. I think—But I think that that's probably correct.

Q. Well, for the sake of this next question, I want you to assume that to be the case—

A. All right.

Q. —The Governor has the power to commute Mr. Jones' sentence to a term of 80 years incarceration in the State's prison. Okay? Now, you've already indicated that you kept these good time, gain time, and merit time credits—

A. That's correct.

Q. —for the purpose of applying those credits in the event of such a commutation. Is that—

A. That's correct. That's correct.

Q. Would you agree that, if the Governor tomorrow [41] issued a commutation of Mr. Jones' sentence to a term of 80 years incarceration in the State's prison, that you would, in fact, then apply all those good and gain time credits, and that he would be unconditionally released immediately, because he would have maxed out that 80-year sentence? Is that correct?

A. Oh. Yes. Because the sentence is no longer a life sentence. That's correct.

Q. Okay. So, if Mr. Jones were serving—

A. And that's he is no longer a life sentence.

Mr. Barfield: All right. Then, would you agree—Judge, if you'll give just a couple more minutes so I can put it together?

The Court: Yes.

Mr. Barfield: All right. I'm ready, Judge.

Q. Secretary Keller, would you agree that, if the Governor issued a commutation to Mr. Alford Jones, and the commutation said Mr. Alford Jones' sentence is commuted to a sentence of imprisonment for a term of 80 years in the State's prison, if she did that tomorrow, he would be released immediately. Would he not?

A. Well, I believe that, if the—if that came to me?

Q. Yes, sir. I know it would come as a great [42] surprise to you, but let's pretend—

A. No, no, no. If—If it came to—If it came to—came to me, I guess my question to her before I took any action on this is, "Is it your intent to commute this life sentences, or rather, this—yeah, this life sentence to a term of—to a term of years?"

And if she told me, "Yes, that's my intent," I would ask her, "If you don't mind, I'd appreciate it if you'd specifically indicate that. Let's amend the—amend the judgment to reflect that."

And that would—that would satisfy me.

Ms. Smiley: May I interrupt, Your Honor? I don't understand that there's any issue that this inmate has—is being—receiving commutation. So I guess I would object to continuing down the line of commutation. It seems somewhat irrelevant to the discussion today.

The Court: I'll allow this question. I agree that this is the second time we've come and gone off on something that's not really related to what we're doing here. So let's—I think this question about the commutation issue is relevant, but I don't think we need to

spend much more time on it. So ask the question again, Mr. Barfield?

Mr. Barfield: Yes, sir.

[43]

Q. So, if the Governor clarified to you that, in fact, she was commuting Mr. Jones' sentence to a term of 80 years in the State's prison, then that would be sufficient for you to apply the good time, gain time, and so forth credits, and thus release Mr. Jones?

A. No. As I said, if she was telling me that—that—since I had the responsibility of exercising discretion of how the good time is to be applied, and because I would want to be consistent with—with my—with the way my predecessors have—have applied it, I would be concerned about whether or not it was, in fact, her intent to—Well, not only her intent, but I will be—be asking her to modify or amend the sentence in this case to—to clearly indicate that he no longer has a life sentence.

Q. All right. Now, can I follow from that that your decision to not award good time, or gain time, or merit credits as sentence reduction credits of all kinds, your decision in that regard is based on your belief that Mr. Jones is still serving a life sentence. That is, a sentence where you never get out?

A. That's correct. I believe he still has a life sentence.

Q. Okay. And if he didn't have a life sentence, that is, if he had a sentence of a term of years, then [44] you would have a different position. That is, he would be entitled to that time to credit?

A. I—Well, if he had—if his sentence was a life—Let me rephrase that. If his life sentence is voided, okay, and a term of years is instituted in place of it, then I would have the—the responsibility of trying to treat his case like I would treat all similar cases. But I—I don't believe in this instance—I believe in this instance he's still serving a life sentence.

Q. And you—

A. Okay? For time—

Ms. Smiley: Let him finish.

A. For conduct that is similar to others who are serving life sentences.

Q. The—In other words you—Of course, you're a lawyer and you've read the—the opinions set forth in *Bowden*?

A. That's correct. But, as—as counsel has—has indicated, today I am here in the Secretary's hat. And I'm trying to—I'm trying to hold that role. So—

Q. All right. Well, you do understand that the—that *Bowden* Court, in its opinion, said that you should consider Mr. Bowden's sentence a sentence for a term of years a term of 80 years in the State's prison without **[45]** any limitation or restriction?

A. Well, I'm—I'm also aware that the Court said that sent that—sent *Bowden* back to the Lower Court for—to—to address this issue of good time and how it is to be applied. And I think that that's the issue that—that we're here trying to address today. And that is, whether or not the Secretary of—the Secretary has the right to exercise his legally-given—Let me rephrase that.

I believe we are here to determine whether or not the Secretary legally has the right to exercise discretion when it comes to the awarding of good time.

Q. The—In one of your earlier answers, you indicated that, if in fact, Mr. Jones were serving a straight sentence, a term sentence, of 80 years, that you would have the responsibility to treat him, then, the same as you would all other inmates who are serving a term of years?

A. I—Mr. Jones or anyone else, if they've got—if—if they're serving a term of—a term of years, then I think that we—I think that, even though the Secretary has some discretion—has discretion when it comes to the awarding of good time, you--you would want to be consistent. So I think that—I think that's a good public policy. I mean, I think that you would want [46] to do that for just a number of—a number of reasons.

Q. Well, you mentioned your discretion. Is it your understanding that you have the discretion to issue regulations that would then determine which inmates are qualified for these credits? Or do you think you have the discretion to just, under the regulations, decide between inmates who gets credits?

A. I think that, by—I think that the Secretary has the—In fact, I think he's been given by law, the—the right to exercise discretion—to exercise his discretion with regard to good time. I mean, obviously in some instances, he cannot exercise that discretion, particularly for those individuals whose—who've committed Type A or Type B offenses or who—felons who have committed Type C offenses and have been sentenced to—to life.

I believe the Legislature has—has carved out that—that growth of inmates and indicated that the Secretary won't be able to give them—will not be—will not be giving him—Let me rephrase that. Will not be giving that category—those categories of individuals day-for-day credit.

Q. Well, if you—I take it, have reviewed the Statute under which your discretion is granted?

A. That's correct.

[47]

Q. Would it be correct that that Statute is G.S. §148-13 (b)?

A. If you'll give me—Let me take a look at it. I think that that's probably correct. But let—

Q. Well, let me just read you what I represent that Statute to say and I'm sure that one of the many good lawyers in this courtroom will correct me if I'm wrong.

(Reading.) With respect to prisoners who are serving prison or jail terms for offenses not subject to the Fair Sentencing Act, and prisoners serving a life term for a Class C felony, the Secretary of Correction may, in his discretion, issue regulations regarding deductions of time from the terms of such prisoners for good behavior, meritorious conduct, work or study, participation in rehabilitation programs, and the like.

Does that sound familiar?

A. I—I believe that's correct.

Q. Okay. So the discretion is to issue the regulations. Right?

A. That's correct.

Q. Now, you, from reading your affidavit, I take it that you have gone back to 1955 and actually reviewed all of the various regulations that the Secretaries of Correction have issued?

[48]

A. Well, me and counsel, yes. Okay?

Q. Well, it was your affidavit that—

A. Yes. And—And I've signed it so, yes.

Q. Okay. And you, in your affidavit, stated that—that no Secretary of Correction had—had exercised discretion with respect to issue regulation—

A. That's correct.

Q. —which you believe cover people with a—

A. That's correct.

Q. —life sentence. Okay. Now, in reviewing those regulations, did you find any instance with respect to pre-Fair Sentencing cases such as Mr. Bowden's, and particularly that would—that would apply to that class of all prisoners sentenced between '74 and '78, in which there was any distinction of any kind made, other than to say they are serving a term of years?

In other words, was there ever a regulation that made a distinction based on the type of conviction, the length of the sentence, the underlying crime, or on any other basis?

A. What I found was that, when looking at the records, no Secretary ever exercised that discretion to allow any inmate who had received a life sentence to have that—that sentence adjusted for the purposes of release.

[49]

What we did find was that those individuals with the life sentences who had received good time got the benefit of the good time to—to have their eligibility date for parole adjusted down. That good time was used to allow the inmate to have his custody determinations made. And, as I indicated earlier, it was also maintained for the purposes of being able to allow it to adjust if a commutation was—was ordered by the—by the Governor.

So that is what we found. Okay?

Q. I'm going to ask you a question that's really specific, just to—the non-lifers, okay, I'm just talking about the regulations that applied to people without a life sentence.

A. All right.

Q. Okay? The regular inmates who just have terms of years for various and sundry crimes, whatever the term may be.

A. All right.

Q. Okay. The regulations applied to those inmates. Do you find in any of those regulations any basis for distinguishing between classes of prisoners serving terms of years?

That is to say, any distinction based on the type of conviction, the crime, the length of a sentence, [50] or any other consideration?

A. I'm not quite—To be quite honest with you, I really don't understand the question.

Q. Okay. Well, the—the regulations that have previously been issued by the previous Secretaries that apply to prisoners serving terms of years, okay?

A. All right.

Q. All right? Pre-Fair Sentencing prisoners. Those regulations allow those credits to every prisoner serving a term of years. Do they not?

A. I think that's correct.

Q. And they don't make any distinction among the classes of prisoners serving a term of years. That is to say, they don't make a distinction on the class or type of felony, don't make a distinction on the basis of the sort of conviction, the number of convictions, the type of underlying facts, no distinctions. If you're serving a term of years, you get the credits. Is that correct?

A. That's correct. If you were serving a term of years then—and you were able to—the Secretaries exercise their discretion to—to allow those individuals to get—to have his or her good time used to adjust that—that release date to use to adjust his or her parole eligibility date, that's—that's correct. And, as I've indicated earlier, for individuals who [51] receive life sentences, they got the benefit of those, too, with the one exception that, for 55 years no Secretary, exercised that discretion to allow that life sentence to be—to be adjusted.

Q. And again, would you agree that, if the judgment in this case, Mr. Jones' judgment from the Lenoir County Superior Court, if it said, you know, Mr. Jones is hereby sentenced to a term of 80 years incarceration in the State prison, that's all it said, where life was never mentioned, that he would have maxed out that sentence and would have been released?

Ms. Smiley: Objection.

The Court: Overruled. Overruled if he knows, based on his review of the facts in this case.

A. I don't have the test run in—in front of me. But—But the bottom—But the bottom line is, as we indicated—as I've indicated earlier, if—if it was a term of years, if it was not a life sentence involved, then I believe that—I believe that the Department records are consistent in that area, too, the individual would get the benefit of the good time to adjust that—their release date.

Q. Okay. Now—

A. But again, not if he had a life sentence.

Q. The release documents that were prepared for [52] Mr. Jones. Are you aware there were release documents prepared and that they were presented to him and he signed them?

Ms. Smiley: Objection, Your Honor. I think his—previous testimony by the Secretary, I think he denied that.

The Court: Overruled if he knows. You may answer that question, sir, if you know.

A. Well, I—I don't believe that—that he was given any document indicating that he would be released on the 29th of October, no. I don't believe that.

Q. Would you—Are you aware of whether—

A. And I certainly didn't direct it.

Q. Are you aware of whether he was given any documents at all related to a release that he would have to have signed if he were going to be released?

A. Well, as part—As I indicated earlier, there was the possibility that we would be ordered to release the individuals on the—on the 29th. I think every institution has some process you would have started working

those individuals through. But the bottom line is, is that no inmate was told that he or she would be released on the 29th. They were told that that was the—there was a possibility that that might occur.

Q. If there were documents presented to Mr. Jones [53] prepared by the Department of Correction that would relate to his release from incarceration, do those documents still exist?

A. Well, I—Let me have the—If I can get the question again?

Q. Well, I've not well-stated, so I'll try that again. Are you aware of any documents prepared in connection with Mr. Jones' possible release which may have been destroyed?

A. No.

Q. So, if documents were prepared for his possible release, they would still exist?

A. I would—I would believe so.

Ms. Smiley: Your Honor, I would object.

A. I must say—I just—

The Court: Hold on.

Ms. Smiley: This line of questioning. Just because they have subpoenaed people from New Hanover, like the case manager. And I assume that's the person who may have worked with the inmate. And I just don't see why beating up the Secretary about what may have happened in Hanover, when they subpoenaed people from Hanover, is particularly useful.

The Court: I would tend to agree with that. Let's—Let's direct questions to this witness [54] about this witness's involvement in, or lack of involve-

ment in, or whatever, related to his dealings. And then those matters can be addressed to the relevant people.

Mr. Barfield: Yes, sir.

The Court: Please continue, Mr. Barfield.

Q. In your affidavit, Secretary Keller, you made some statements in which you seem at least to be giving your—your under oath statement as to the intent or judgment that may have been exercised by previous Secretaries of Correction. Do you recall that?

A. I—I think that's—that's correct.

Q. Now, the—Tell us what information you have that allows you to define the intent of those previous Secretaries of Correction?

A. Define?

Ms. Smiley: Your Honor. Object to the form, although he can answer.

The Court: Overruled. He can answer to what degree he is involved in defination, if he is. So you may answer that question, Secretary Keller.

A. Yes, sir. As I indicated, we did go—I asked for the records to be—to be checked, okay. To try and determine again whether or not any Secretary had ever [55] released an inmate who had received a life sentence unsupervised. And clearly the answer to that was no. Everyone that I talked to who had had contact with this issue, had some information on this issue, indicated that to be—to be so.

But, no inmate who had received a life sentence had ever been released unsupervised. That he or she, if released, was—was released on parole. Okay.

Q. And I take it that, when you say you looked at records or asked records to be looked at—

A. That's correct, sir.

Q. —what records would you be referring to?

A. Particularly, I asked for Combined Records to look at, to look at all records of inmates who had been—who had been released, to try and determine whether or not there was anyone who had ever been released who had served a life's—rather, who had a life sentence, whether or not someone so situated had ever been released unsupervised or without probation. And the answer was no.

Q. And I'm going to just ask this with regard to the *Bowden* class, that is, those inmates sentenced between 1974 and 1978. Did you look and determine that the Department of Corrections had not applied any of the good time credits for those inmates to reduce their [56] sentences?

A. That's correct. Not only the Ballard—Not only the *Bowden* class of—of individuals, but anyone who had received a life sentence.

And that's—And that's the point. We wanted the *Bowden* class of individuals to be—to be addressed similar to the way that we had addressed individuals who had received life sentences who were in other classes.

And again, the reason for that is because of the track record that we have for that class—rather, that group of individuals. In other words, as I—In other words, as I've indicated earlier, less than eight percent of those individuals returned to our prison—prison doors. And that means that you don't have more victims created out here in our—in our state.

So 92 percent, I think—A 92 percent success rate, I think is a positive thing. And I think we would like to see the same thing happen with the *Bowden* group of individuals. And, as you've indicated, in the *Bowden* group, we have individuals who are on map programs who—who have parole eligibility dates. We just simply would like to see them go through the process.

Q. Now, do I understand your affidavit to say that you do not believe that any Secretary of Correction prior to the decision in *Bowden* believed they had the authority **[57]** to issue sentence reduction credits to people with life sentences?

A. That's correct.

Q. So, prior tot he *Bowden* decision, none of your predecessors would have even understood they had the discretion to issuing a regulation that would have given the *Bowden* class those credits?

A. I believe that each one of—I believe that those Secretaries believed that—that they were going to be treating—that they were going to be—that they would consistently be treating anyone who received a life sentence consistently. That life—In their mind, life meant life. And, prior to the Court of Appeals indicating otherwise, it's clear that that's what every—and I'm only the Secretary, but it's clear from looking at the records that was the opinion within the Department of Correction, that life meant life.

Q. So until the State decision was issued in *State versus Bowden*, neither you nor any prior Secretary of Correction could have made any judgment about whether or not somebody in the *Bowden* class should have sentence reduction credits because they wouldn't have even thought they qualify under the Statute?

A. Well, I—I think that, based upon—based upon how—how life—persons who had received life [58] sentences were—were treated, that there was some consistency there.

I mean, clearly there was that consistency because no one who received a life sentence ever had that life sentence date adjusted. And I say date, that life or—I believe the records reflected 999 or 888. No on e who had received a life sentence ever had the life sentence adjusted by good time. That is consistently throughout the—throughout the record.

So, in that sentence, they—there was an exercising of their discretion to ensure that that would consistently always occur.

Q. Well, my question is, do you understand that, prior to the decision in *Bowden*, the Secretaries were under the impression that they didn't have any statutory authority to offer sentence reduction credits to people with life sentences?

A. I believe—Yes. I believe that—I believe that they all—I believe that the Secretaries believe that life meant life.

Q. My question, and I'm sorry to have to repeat it, but, do you understand that the authority to issue regulations granting these credits comes from a Statute?

A. That's correct.

Q. Okay. Are you aware of any Statute that was in [59] effect any time from 1974, let's say, to the present that—that you interpreted as allowing you the authority to offer credits to someone with a life sentence?

A. Yes. I think the Statute indicated that the Secretary had the discretion to exercise his judgment

when it came to the awarding of good time, with the exception now of A & B felonies, individuals convict—convicted of A & B felonies, and Class C felonies who—who have received life sentences.

Q. Now, in your affidavit, do you recall the statement you made, "No doubt, no Secretary exercised this authority," that is, to grant these credits, "because they do not believe or understand that Section 14-2 provided an unconditional release date to which good and gain time credits could be applied."

A. That's correct.

Ms. Smiley: Your Honor, if I may inquire of Mr. Barfield as to how much longer. I don't know about you, but it seems the witness has been up there for a while.

Mr. Barfield: Judge, I believe I'm through, if I could just get another—consult with counsel here.

Judge, that's all I have on direct.

The Court: Any cross? "Cross- [60] examination"?

Ms. Smiley: I'm sure. I don't know that you feel it necessary to—for us to wait and put on our case in terms of my saying that his affidavit is—in the *Folston* case which is using the same affidavit that's already been provided to the Court. And we would like him to just to authenticate it. And I don't know if you want to go through waiting until I present my case or can I go ahead and just have him authenticate the affidavit that was filed is his affidavit.

The Court: Any objection to the affidavit from the *Folston* case?

Mr. Barfield: Judge, I—I'm not sure there's even a need to authenticate it. It's filed and it's an affidavit. And the Court's accepted it as part of the State's filings. We certainly do not object to the Court treating it as Mr. Keller's affidavit.

The Court: Okay.

Ms. Smiley: Thank you.

The Court: Allowed.

Ms. Smiley: Thank you.

The Court: Any other questions at this point of this witness?

Ms. Smiley: Just a couple, Your Honor.

CROSS-EXAMINATION BY MS. SMILEY:

[61]

Q. You talked about the two tracks you were on and you were dealing with the possibility. Would it be fair to say that that was the worse case scenario possibility?

A. That's correct.

Q. I mean, is that the—

A. That's correct.

Q. —track you were on?

A. That's correct.

Q. And that's for the public safety reasons that you talked about?

A. That's correct.

Q. Okay. Now, in fact, after the *Bowden* case, you did in fact calculate an unconditional release date for the *Bowden* inmates. Is that correct?

A. That's right. There was a—

Q. Do you have your affidavit there?

A. I don't.

Q. Okay.

A. I believe there was a test run for—for parole—

Q. Now—

A. —all the *Bowden* type of inmates.

Ms. Smiley: May I approach, Your Honor?

The Court: You may.

Q. I believe attached to your affidavit is an [62] Exhibit D?

A. Yes, ma'am.

Q. Okay. Did you in fact, for the *Bowden* group of inmates, have a—an unconditional release date calculated?

A. That's correct.

Q. And what is that calculation?

A. The life sentence—

The Court: As to the inmates or as to this inmate?

Ms. Smiley: This—This is a directive as to all the *Bowden* class of inmates, which would include Mr. Jones.

The Court: Okay.

A. The life sentences for the *Bowden* class of inmates must now be treated as a statutory life sentence of 80 years. Therefore, I directed that each life sentence imposed for crimes during the relevant time period, again, conditional release dates shown to be calculated as 80 years minus the applicable jail credit earned while a prisoner awaited conviction and sentencing.

Ms. Smiley: So these inmates—May I approach, Your Honor?

The Court: Yes.

[63]

Q. The *Bowden* inmates and Mr. Jones here do, in fact, have an unconditional release date when they were to be released without supervision?

A. That's correct. That's correct.

Q. And are the—the jail—The pre-trial confinement credits, are those statutory?

A. That's correct.

Q. And so you are required to deduct them from the release date?

A. That's correct.

Q. Okay. Now, before the *Bowden* case, was there a number, before the decision came down, was there a number related to a life sentence?

A. Yes. It—It would have been reported as life or the records would have reflected 999 or 888.

Q. And to your knowledge, has Mr. Jones' judgment been mentioned so it does not read life?

A. It has not.

Q. Okay. Now, you understand now that the—the *Bowden* Court has said that these—this group of inmates, in this four years, their life sentence can be treated as having an 80-year number on it. Is that correct?

A. That's—That's correct. That's correct.

Q. Is that the number you use to calculate the [64] unconditional release dates for the group of *Bowden* inmates?

A. That's correct.

Q. Okay. Now, is it true that, understanding that there is now a number from which you can deduct for the *Bowden* group of inmates, did you exercise your discretion and decline to apply good behavior credits to reduce unconditional release dates for the *Bowden* inmates?

A. That is absolutely correct.

Q. And is that consistent with how you treat all the life prisoners that are subject to your statutory discretion?

A. That's correct.

Ms. Smiley: Your Honor, you have the Secretary's affidavit, you have his testimony. I have no further questions, but he's here. If there are any questions you would like to ask him, I open the floor to you because it is a complicated question and there may be issues that we have not addressed that you would like to address right now.

The Court: I don't have any questions at this time. Is there any redirect, Mr. Barfield?

Mr. Barfield: Judge, no, sir.

APPENDIX J

BROWN HEARING TRANSCRIPT, Dec. 11, 2009 (excerpt)

[2] THE COURT: ... We also discussed at the previous hearing on Wednesday and, in Wayne County I'd be able to take, [3] and both sides agree I'd be able to take judicial notice of Secretary Keller's testimony in the Wayne County proceedings, which is Alfred Jones v. Keller and others, Wayne County file number 09 CRS 8633.

Both sides agree I can take judicial notice of that for purposes of this judicial proceeding?

MS. FARBER: Yes.

MS. SMILEY: Yes, Your Honor.

THE COURT: All right.

And also as, as discussed in chambers I believe both sides have agreed that I can take judicial notice of the internal Department Correction policies and procedures, I believe currently dated 2007, dealing with the award of sentencing reduction credits according to the internal policies.

Both sides agree to that?

MS. SMILEY: Yes.

MRS. FARBER: Yes.

* * *

[DIRECT EXAMINATION OF FAYE BROWN]

[10]

Q. What is your custody grade?

A. My current custody grade is level 3 work release.

Q. Level 3 work release. Do you get community along with that?

A. Yes.

Q. How often do you get community?

A. I can take a 6 hours community pass 3 times a week for 6 hours.

Q. Do you ever get an opportunity to leave for a fewer days at once?

A. Yes.

Q. How often do you get those?

A. A, twice a month for 48 hours.

Q. How long have you been on work release?

A. I've been on work release. I started in 1989.

Q. 1989.

A. Yes.

Q. Oh, thank you. Where do you work now?

A. Right now I work at Sherrill's University of Barber and Cosmetology in Raleigh.

Q. How long have you been there?

A. I've been there 4 years.

Q. What do you do at Sherrill's?

A. In the daytime I'm an administrative assistant. In the evening I'm a instructor in training.

* * *

APPENDIX K

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAYNE	File No. 09R226
ALFORD JONES Petitioner, v. ALVIN KELLER, Secretary of the Department of Correction, and SUSAN R. WHITE, Administrator of New Hanover Correctional Center, Respondents.	AFFIDAVIT OF TERESA O'BRIEN

TERESA O'BRIEN, being first duly sworn, hereby deposes and says as follows:

1. I am an adult over the age of 18 years, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this affidavit of my own free will, stating facts of which I have personal knowledge.

2. I am employed by the North Carolina Department of Correction ("DOC") in the Combined Records Section as Administrative Officer II and have been so employed since 2007. Under North Carolina General Statutes, Sections 148-74 and -76, case records compiled for the use of the Secretary of Correction and the Post-

Release Supervision and Parole Commission ("Parole Commission") are maintained in a single central file system. Administration of the prison records system is under the control and direction of the Secretary. The Combined Records Section maintains combined case records of all prisoners.

3. Since 1991 I have been the supervisor of the Audit Section within Combined Records. The Audit Section, which now consists of myself and seven auditors, reviews judgments for completeness and accuracy in order to ensure that inmates' sentences are recorded correctly in the Offender Population Unified System ("OPUS"), the electronic database maintained by DOC. As Audit Section Supervisor, I also review other court documents including appellate opinions, orders for immediate release, orders providing additional jail credit, and orders amending judgments. I provide information about sentences and release dates to DOC officials and employees, court officials and employees, and the general public. The Audit Supervisor position requires thorough knowledge of sentencing statutes and guidelines.

4. From about 28 July 1997 through 31 March 1998, I also was Acting Manager for the Combined Records Section. On 1 April 1998 Judy Sills became the Manager of the Combined Records Section. Ms. Sills is currently out on medical leave. Altogether, I have worked for the Combined Records Section for about twenty-six years.

5. Based on my many years with Combined Records, I am familiar with how the rules regarding good behavior credits have been applied to prisoners with life sentences. Combined Records has never calculated unconditional release dates for prisoner with life sen-

tences, including Inmate Jones. DOC has never unconditionally released a prisoner with a life sentence. Good behavior credits, which include good, gain, and merit time, have never been applied to life sentences in order to calculate an expiration or unconditional release date. Records of good behavior credits have been maintained solely for use in custody classification decisions, parole eligibility calculation, and commutations. My review of the combined record of Inmate Alford Jones maintained by DOC shows that rules on good behavior credits were consistently applied in this same manner and on the same limited basis to his life sentence.

6. Inmate Jones' combined inmate record shows that on 19 March 1975 in Lenoir Criminal Superior Court, he was convicted by a jury of felony murder and sentenced to death. (Attachment A.) The Inmate Classification Profile shows Jones' minimum sentence as "Death Row" with the maximum sentence left blank. (Attach. B.) Thereafter, on 27 September 1976, Inmate Jones' death sentence was vacated and he was sentenced to be imprisoned for the term of his natural life. (Attach. C.) Department records show the sentence of natural life has never been amended by the courts.

7. Because Inmate Jones' crime was committed so long ago, Combined Records has maintained his inmate record in both paper and electronic form. Early paper records dating from when he was under a death sentence show his minimum sentence was recorded as "88-88-88." This numeric code denotes a death sentence. No maximum sentence or expiration date is shown. (Attach. D.)

8. Numerous paper records in Inmate Jones' combined inmate record show that consistent with DOC practice, his life sentence always was treated by

DOC as a life sentence with no expiration or release date. For example, a 1976 Inmate Classification Profile form shows "life" for the minimum sentence length and the maximum sentence length was left blank. (Attach. E.) A 20 October 1976 Parole Commission form requesting additional court records from the Lenoir County Clerk of Superior Court shows Jones' sentence as "99/99/99." (Attach. F.) The "99/99/99" code denotes a life sentence. A Central Classification Board Referral and Action Form DC-121A dated 13 September 1977 shows Jones' tentative release date as "Life," and his tentative parole eligibility date as 19 March 1995. (Attach. G.) A similar classification action form from October 1982 shows his sentence as "Life" and his release date as "Life." (Attach. H.) At Jones' April 1986 classification review, the form shows a sentence of "Life," a release date of "Life" and a parole eligibility date of 24 May 1987. (Attach. I.) A classification record from January 1988 shows a sentence of "Life," a release date of "Life," and a parole eligibility date of 24 May 1987. (Attach. J.) A February 1992 classification form shows a sentence of "Life," a release date of "Life," and a parole eligibility date of 24 May 1987. (Attach. K.) These references in Jones' combined record are consistent with longstanding DOC practices relating to life sentences.

9. Even though Inmate Jones' combined inmate record shows his life sentence had no expiration or release date, the record also shows he was awarded pretrial confinement and good time credits for the limited purposes of custody classification and parole eligibility. The classification record from September 1977 described in Paragraph 8 above shows Jones' parole eligibility date as 19 March 1995. (Attach. G.) By statute, Jones was required to serve 20 years in order to become eligible for parole consideration, and he was con-

victed in March 1975. In a letter dated 3 April 1980, Case Analyst Keith Hester informed Jones that he was required to serve 20 years before he could be paroled. Analyst Hester also explained to Jones that the parole eligibility date was 19 March 1995. (Attach L.) In a letter dated 30 March 1982, Case Analyst Frank Rogers explained to Jones that the Parole Commission had applied good time credit towards his parole eligibility date, changing his parole eligibility date to 9 May 1989. (Attach. M.) An additional letter dated 8 March 1984 from Case Analyst Anne Presley informed Jones that additional good time was credit changing his parole eligibility date to 24 May 1987. (Attach. N.) Current electronic records in Jones' combined record show a parole eligibility date of 26 September 1986. (Attach. O.) The combined record also shows that good time credits were applied to result in parole eligibility much sooner than his 20-year flat eligibility date of 19 March 1995. In other words, because good time credit was applied to reduce the 20-year requirement, Jones could be considered for parole after serving around 11 years. Since 1986, Inmate Jones has received annual parole reviews, but the Parole Commission has declined to parole him. (Attach. P & Q.)

10. Under policies in place in 1984, Inmate Jones could not have been considered for promotion to minimum custody until he was within 48 months of a prospective release date, which was defined as either expiration of sentence or a parole eligibility date. For purposes of custody promotion of inmates with life sentences, a potential parole date would be computed on the basis of 80 years. This is true for all inmates with life sentences including those subject to Section 14-2 (1974).

11. Based on his parole eligibility date in September 1986, Inmate Jones could have been considered for

promotion to minimum custody as early as 48 months before that date, which would have been in 1982. The October 1982 Director's Review Committee Referral and Action form shows that Jones was removed from intensive management and reassigned to close custody. (Attach. H.) An April 1986 Reclassification form shows that Jones was recommended to remain in medium custody. (Attach. I.) In February 1992 Jones was promoted to minimum custody. (Attach. K.)

12. Combined Records transitioned from paper records to a semi-automated system in which staff entered data by keypunching. In the semi-automated system, a comprehensive report could be generated that contained all offender sentence information and prison history. The comprehensive report for Inmate Jones shows that his minimum sentence and minimum release were "LIFE" and his maximum sentence and release were "000000." (Attach. R.)

13. A July 1993 Classification Custody Action form shows that Inmate Jones was reviewed for the Mutual Agreement Parole Program ("MAPP") in March 1993. MAPP is a program jointly administered by the Division of Prisons and the Parole Commission. Upon agreement by the Division of Prisons and the Commission, an inmate is offered a contract with terms and conditions that must be completed while in prison. If the inmate successfully completes all requirements, the inmate will be paroled on a date certain. This is in contrast to simply being eligible for parole consideration. In July 1993 Jones was not promoted to custody level Minimum II because the psychological evaluation required for MAPP had not been completed. (Attach. S.)

14. A September 1993 Inmate Activity Assignment Action form shows that Division of Prisons staff

decided to recommend Inmate Jones for consideration for a MAPP contract. Jones' custody classification at that time was Minimum I. (Attach. T.)

15. Inmate Jones' combined record shows that he signed a MAPP contract on 27 June 2007. The contract stated that Jones was required to move through the minimum custody levels to Minimum III, the least restrictive status, by November 2008. If Jones abides by all terms and conditions of the contract, he will be paroled on 27 June 2010. (Attach. U & V.)

16. Based on the court decision in *State v. Bowden*, the Secretary of Correction has directed the Combined Records Section to calculate unconditional release dates for inmates serving life sentences imposed for crimes committed beginning 8 April 1974 through 30 June 1978. The Secretary directed further that the combined records of such inmates should be changed to show statutory life sentences of 80 years with credit only for pretrial confinement.

17. Prior to the Secretary's directive, in accord with longstanding Department practice for inmates with life sentences, Inmate Jones' Release Date Calculation report (OT50) showed a projected release date of life with time remaining as "99999." (Attach. W.) In accord with the Secretary's directive, the Combined Records Section has calculated an unconditional release date for Inmate Jones. As of 25 November 2009, Inmate Jones' revised Release Date Calculation report (OT50) reflects a projected unconditional release date of 27 February 2055 and 16,530 days of time remaining to be served. (Attach. X.) This projected date could change if Jones' credits increase or decrease.

18. The Court has asked for information on any sentence reduction credits to which Inmate Jones may

be entitled. DOC's Management Information Systems Section ("MIS") has created a document as a "Test Run" by the subscription "RUNNING IN REGION: NCC3." This document shows the accumulated good, gain, and merit time credits recorded by DOC for Jones. (Attach. Y, TEST RUN OT50 11/30/09.) The document shows that as of 30 November 2009, if it should be determined that Jones is entitled to have all of these credits deducted from his Statutory Life—80-year term, his projected release date would be 4 February 2006. This test run projected release date, however, is not the release date currently projected by DOC. That date is shown as 27 February 2055 in Attachment X.

19. Calculations used by the Department and in OPUS for good time are shown in Attachment Z. Calculations used for gain time are shown in Attachment AA. This data was provided by the Management Information Systems Section.

This the 1st day of December, 2009.

/s/ Teresa O'Brien
Teresa O'Brien

Sworn to and subscribed before me,
this the 1st day of December, 2009.

/s/ Elizabeth F. Price
Notary Public

My Commission Expires: 4-20-12.

stamp:
ELIZABETH F. PRICE
NOTARY PUBLIC
WAKE COUNTY, NC

APPENDIX L

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAKE	File No. 09 CVS 23746
FAYE B. BROWN, Petitioner v. THE NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER, in his capacity as Secretary of the Department of Correction, and KENNETH ROYSTER, in his capacity as Superintendent of Raleigh Correctional Center for Women, Respondents.	AFFIDAVIT OF TERESA O'BRIEN

TERESA O'BRIEN, being first duly sworn, hereby deposes and says as follows:

1. I am an adult over the age of 18 years, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this affidavit of my own free will, stating facts of which I have personal knowledge.

2. I am employed by the North Carolina Department of Correction ("DOC") in the Combined Records

Section as Administrative Officer II and have been so employed since 2007. Under North Carolina General Statutes, Sections 148-74 and -76, case records compiled for the use of the Secretary of Correction and the Post-Release Supervision and Parole Commission ("Parole Commission") are maintained in a single central file system. Administration of the prison records system is under the control and direction of the Secretary. The Combined Records Section maintains combined case records of all prisoners.

3. Since 1991 I have been the supervisor of the Audit Section within Combined Records. The Audit Section, which now consists of myself and seven auditors, reviews judgments for completeness and accuracy in order to ensure that inmates' sentences are recorded correctly in the Offender Population Unified System ("OPUS"), the electronic database maintained by DOC. As Audit Section Supervisor, I also review other court documents including appellate opinions, orders for immediate release, orders providing additional jail credit, and orders amending judgments. I provide information about sentences and release dates to DOC officials and employees, court officials and employees, and the general public. The Audit Supervisor position requires thorough knowledge of sentencing statutes and guidelines.

4. From about 28 July 1997 through 31 March 1998, I also was Acting Manager for the Combined Records Section. On 1 April 1998 Judy Sills became the Manager of the Combined Records Section. Ms. Sills is currently out on medical leave. Altogether, I have worked for the Combined Records Section for about twenty-six years.

5. Based on my many years with Combined Records, I am familiar with how the rules regarding good behavior credits have been applied to prisoners with life sentences. Combined Records has never calculated unconditional release dates for prisoner with life sentences, including Inmate Faye Beatrice Brown. DOC has never unconditionally released a prisoner with a life sentence. Good behavior credits, which include good, gain, and merit time, have never been applied to life sentences in order to calculate an expiration or unconditional release date. Records of good behavior credits have been maintained solely for use in custody classification decisions, parole eligibility calculation, and commutations. My review of the combined record of Inmate Brown maintained by DOC shows that rules on good behavior credits were consistently applied in this same manner and on the same limited basis to her life sentence.

6. Inmate Brown's combined inmate record shows that in Martin Criminal Superior Court she was convicted by a jury of first-degree (felony) murder committed on 2 September 1975 and was sentenced to death on 16 January 1976. (Attachment A.) On 30 June 1977, Brown's death sentence was vacated and she was sentenced to be imprisoned for the term of the remainder of her natural life. (Attach. B.) Department records show the sentence of natural life has never been amended by the courts.

7. Because Inmate Brown's crime was committed so long ago, Combined Records has maintained her inmate record in both paper and electronic form. Early paper records dating from when she was under a death sentence show her minimum sentence was recorded as "88-88-88." This numeric code denotes a death sen-

tence. No maximum sentence or expiration date is shown. (Attach. C & D.)

8. After the court changed Inmate Brown's sentence to a sentence of natural life, by an order signed 17 August 1977, the Court also awarded 137 days' pretrial confinement credit, and the credit was noted by Combined Records staff. (Attach. E.)

9. Numerous paper records in Inmate Brown's combined inmate record show, consistent with DOC practice, that her life sentence always was treated as a life sentence with no expiration or release date. For example, a February 1978 Classification Action form shows "Life" for the tentative release date and the minimum release date was left blank. It also shows a tentative parole eligibility date of 1 September 1995. (Attach. F.) A February 1982 Classification Referral and Action Form shows Brown's sentence as "Life," the tentative release date as "Life," and the tentative parole eligibility date of 1 September 1995. (Attach. G.) A Classification Referral and Action Form DC-121 dated 15 April 1983 shows Brown's sentence as "Life," her tentative release date as "Life," and her tentative parole eligibility date as 2 February 1989. (Attach. H.) A similar classification form dated 22 September 1983 shows Brown's sentence as "Life," her tentative release date as "Life," and her tentative parole eligibility date as 3 July 1988. (Attach. I) A Reclassification Action form dated 12 June 1986 shows her sentence as "Life," her release date as "Life," and her parole eligibility date as 3 July 1988. (Attach. J.) In a 15 April 1997 response to a letter from Inmate Brown, Hazel Keith, Manager, Combined Records, explained to Brown that her sentence was "Life," therefore, no release date was projected for her. (Attach. K.) These references in

Brown's combined record are consistent with long-standing DOC practices relating to life sentences.

10. On or about 27 October 1980, Inmate Brown wrote to the Governor's legal counsel requesting a commutation of her sentence. In a letter dated 25 November 1980, Parole Case Analyst Butler informed Brown that the Parole Commission could not recommend that the Governor reduce Brown's sentence. (Attach. L.)

11. Even though Inmate Brown's combined inmate record shows her life sentence had no expiration or release date, the record also shows she was awarded pre-trial confinement and good time credits for the limited purposes of custody classification and parole eligibility. The classification record from February 1978 described in Paragraph 9 above shows Brown's parole date as 1 September 1995. (Attach. F.) By statute, Brown was required to serve 20 years in order to become eligible for parole consideration, and she was convicted in January 1976. In a letter dated 4 January 1982, Case Analyst Harold E. Bragg informed Brown that she was credited the appropriate amount of good time credit and jail credit to which she was due and her recalculated parole eligibility date was 1 December 1989. (Attach. M.) In a letter dated 20 March 1984, Case Analyst Dorothy Jones noted that Brown's parole eligibility date was 3 July, 1988 and also explained to Brown that the Parole Commission did not calculate maximum release dates and that her sentence was "Life" and her release date was "Life." (Attach. N.) Current electronic records in Brown's combined record show a parole eligibility date of 1 January 1987. (Attach. O.) The combined record also shows that pre-trial confinement and good time credits were applied to result in parole eligibility much sooner than her 20-year flat eligibility

date of 1 September 1995. In other words, because jail time and good time credit were applied to reduce the 20-year requirement, Brown could be considered for parole after serving around 11 years. Since 1987, Brown has received annual parole reviews, but the Parole Commission has declined to parole her. (Attach. P (Letter dated 30 June 1987; Attach. Q (Letter dated 27 June 1990); Attach. R (Letter dated 23 June 1995); Attach. S (Notice of Parole Denial dated 21 June 2006; & Attach. T (Parole Commission Events form dated 30 November 2009.)

12. Under policies in place in 1984, Inmate Brown could not have been considered for promotion to minimum custody until she was within 48 months of a prospective release date, which was defined as either expiration of sentence or a parole eligibility date. For purposes of custody promotion of inmates with life sentences, a potential parole date would be computed on the basis of 80 years. This is true for all inmates with life sentences including those subject to Section 14-2 (1974).

13. Based on her parole eligibility date in January 1987, Inmate Brown could have been considered for promotion to minimum custody as early as 48 months before that date, which would have been in 1983. The April 1983 Classification Referral and Action form shows that Brown was considered for promotion to minimum custody but the promotion was denied at that time. (Attach. H.) A May 1984 Classification Referral and Action form shows that Brown had been promoted to minimum custody. (Attach. U.) As shown by a 13 February 1995 Inmate Activity Assignment Action form, Brown continued to be held in minimum custody. (Attach. V.) An Inmate Summary Record dated 1 May

2009 shows that Brown has been held in minimum custody level III since 14 August 1998. (Attach. W.)

14. Based on the court decision in *State v. Bowden*, the Secretary of Correction has directed the Combined Records Section to calculate unconditional release dates for inmates serving life sentences imposed for crimes committed beginning 8 April 1974 through 30 June 1978. The Secretary directed further that the combined records of such inmates should be changed to show statutory life sentences of 80 years with credit only for pretrial confinement.

15. Prior to the Secretary's directive, in accord with longstanding Department practice for inmates with life sentences, Inmate Brown's Release Date Calculation report (OT50) showed a projected release date of life with time remaining as "99999." (Attach. X) In accord with the Secretary's directive, the Combined Records Section has calculated an unconditional release date for Inmate Brown. As of 30 November 2009, Brown's revised Release Date Calculation report (OT50) reflects a projected unconditional release date of 12 August 2055 and 16,691 days of time remaining to be served. (Attach. Y.) This projected date could change if Brown's credits increase or decrease.

16. The Court has asked for information on any sentence reduction credits to which Inmate Brown may be entitled. DOC's Management Information Systems Section ("MIS") has created a document identified as a "Test Run OT50." This document shows the accumulated good, gain, and merit time credits recorded by DOC for Brown. (Attach. Z, Test Run OT50 12/07/09.) The test document shows that, as of 7 December 2009, if it should be determined that Brown is entitled to have all accumulated credits deducted from her Statu-

tory Life—80-year term, her projected release date passed in early 2009. This test run projected release date was not calculated by Combined Records and is not the release date currently projected by DOC. That date is shown as 12 August 2055 in Attachment Y.

17. MIS calculations rates used by the Department and in OPUS for good time are shown in Attachment AA. Calculation rates used for gain time are shown in Attachment BB. This data was provided by the Management Information Systems Section.

This the 8th day of December, 2009.

/s/ Teresa O'Brien
Teresa O'Brien

Sworn to and subscribed before me,
this the 8th day of December, 2009.

/s/ Elizabeth F. Price
Notary Public

My Commission Expires: 4-20-12.

stamp:
ELIZABETH F. PRICE
NOTARY PUBLIC
WAKE COUNTY, NC

APPENDIX M

STATUTORY PROVISIONS

1933 N.C. Sess. Laws ch. 172, §23

That State Highway and Public Words Commission in the adoption of rules and regulations hereinbefore provided for shall provide for the classification of prisoners according to conduct into at least three classes known and designated as "A," "B" and "C" grade prisoners. The several classes of prisoners may be designated by appropriate and distinguishing uniforms, but no person not convicted of a felony shall be required to wear a uniform of stripes such as are usually used to designate felons. A system of rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct may be adopted, and the commutation of time within the maximum limits of the provisions now provided by law in Consolidated Statutes 7725 may be included in said rules and regulations.

N.C. Gen. Stat. §148-11 (1955)—Authority to make regulations.

The Director of Prisons shall establish rules and regulations for the government of the State prison system, which shall become effective when approved by the Prison Advisory Council, the State Highway and Public Works Commission, and the Governor. The Director shall have such portion of these rules and regulations as pertain to enforcing discipline read to every prisoner when received in the State prison system and a printed copy of these rules and regulations shall be made available to the prisoners.

N.C. Gen. Stat. §148-13 (1955)—Rules and regulations as to grades, allowance of time and privileges for good behavior, etc.

The rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior, the amount of cash, clothing, etc., to be awarded prisoners after their discharge or parole.

N.C. Gen. Stat. §148-13 (1974)—Rules and regulations as to grades, allowance of time and privileges for good behavior, etc.

The rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior, the amount of cash, clothing, etc., to be awarded prisoners after their discharge or parole.

N.C. Gen. Stat. §14-2 (1974)—Punishment of felonies; what constitutes life sentence.

Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, in the discretion of the court. A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison.

N.C. Gen. Stat. §148-11 (1977)—Authority to make regulations.

The Secretary shall propose rules and regulations for the government of the State prison system, which shall become effective when approved by the Department of Correction. The Secretary shall have such portion of these rules and regulations as pertain to enforcing discipline read to every prisoner when received in the State prison system and a printed copy of these rules and regulations shall be made available to the prisoners.

1979 N.C. Sess. Laws ch. 760, §4 (excerpt)

* * *

G.S. 148-13 is rewritten to read as follows:

"§ 148-13. *Regulations as to custody grades, privileges, gain time credit, etc.*—

(a) The Secretary of Correction may issue regulations regarding the grades of custody in which State prisoners are kept, the privileges and restrictions applicable to each custody grade, and the amount of cash, clothing, etc., to be awarded to State prisoners after their discharge or parole.

(b) With respect to prisoners who are serving prison or jail terms either for felonies that occurred before the effective date of Article 81A of Chapter 15A of the General Statutes, or for misdemeanors regardless of the date of occurrence, the Secretary of Correction may, in his discretion, issue regulations regarding deductions of time from the terms of such prisoners for good behavior, meritorious conduct, work or study, participation in rehabilitation programs, and the like.

(c) With respect to all State prisoners serving prison terms for felonies that occurred on or after the effective date of Article 81A of Chapter 15A of the General Statues, the Secretary of Correction must grant credit toward their terms for good behavior as required by G.S. 15A-1340.7. The provisions of this section shall not apply to persons convicted of Class A or Class B felonies.

(d) With respect to prisoners serving prison or jail terms for felonies that occurred on or after the effective date of Article 81A of Chapter 15A, the Secretary of Correction shall issue regulations authorizing gain time credit to be deducted from the terms of such prisoners, in addition to the good behavior credit authorized by G.S. 15A-1340.7. Gain time credit may be granted for meritorious conduct and shall be granted for performance of work inside or outside the prison or jail. Gain time credit earned pursuant to regulations issued under this subsection shall not be subject to forfeiture for misconduct. Gain time shall be administered to qualified prisoners as follows:

(1) Gained time I. In addition to the good behavior credit authorized by G.S. 15A-1340.7, prisoners who perform short-term work assignments (requiring a minimum of four hours of actual work per day) shall receive credit for work performed at the rate of two days per month.

(2) Gained Time II. In addition to the good behavior credit authorized by G.S. 15A-1340.7, prisoners who perform job assignments requiring a minimum of six hours work per day or who perform in part-time work release programs shall receive credit at the rate of four days per month.

(3) Gained Time III. In addition to the good behavior credit authorized by G.S. 15A-1340.7, prisoners who perform job assignments requiring a minimum of six hours per day with requirements for specialized skills or specialized responsibilities, as well as inmates participating in full-time work release shall receive credit at the rate of six days per month.

The Secretary of Correction may, in his discretion, grant gain time credit at a rate greater than the rates specified in this subsection for meritorious conduct or emergency work performed, provided, however, that the rate of gain time granted for emergency work performed shall not exceed 30 days per moth, nor shall the rate of gain time granted for meritorious conduct exceed 30 days for each act of meritorious conduct.

(e) The Secretary's regulations concerning time deductions as authorized by subsection (b), gain time credit as authorized by subsection (d), and prisoner conduct as required by G.S. 15A-1340.7(b), shall be distributed to and followed by county and district jail administrators with regard to sentenced prisoners covered by subsection (b) and (d)."

APPENDIX N

REGULATIONS

5 N.C. Admin. Code 2B.0100 (1976)

SUBCHAPTER 2B—INMATE CONDUCT RULES, DISCIPLINE

SECTION .0100—GOOD TIME AND GAINED TIME

.0101 PURPOSE

This policy established a method of computing Good Time for acceptable behavior and earned Gained Time for behavior which would not normally be required of an inmate confined within any of the facilities within the Division of Prisons. All inmate, including CYO's and those with life terms, shall be allowed a maximum of 107 days Good Time for acceptable behavior for each year served. Good Time shall be subjected to forfeiture for misbehavior as determined by appropriate disciplinary action. Regular Good Time shall be computed on a pro rata basis and shall be the equivalent of 8.94 days per 30.4 day month or 29.411% of total sentence length.

History Note: Statutory Authority G.S. 148.11; Effective February 1, 1976.

.0102 APPLICATION

All inmates who perform work, whether full-time or part-time or participate in specific training programs which would assist in their productive reentry into the community, shall be allowed additional Gained Time which shall be regulated as Gained Time I, II, and III. Gained Time shall not be subjected to forfeiture and will be administered as follows:

(1) Gained Time I. In addition to the 8.94 days per 30.4 day month of regular Good Time, inmates who perform short-term work assignments (requiring a minimum of 4 hours of actual work per day) or who participate in on-site academic and vocational training programs shall be eligible to receive an additional 2.09 days per month Gained Time for a total of 11.03 days per 30.4 day month. Such additional Gained Time shall not be subject to forfeiture for misbehavior and shall be the equivalent of 6.89% of the remaining sentence.

(2) Gained Time II. In addition to the regular Good Time of 8.94 days per 30.4 day month, all inmates who satisfactorily perform job assignments requiring a minimum of 6 hours work per day or who perform acceptably in part-time work release or study release programs shall be allowed an additional 3.81 days Gained Time for a total of 12.75 days per 30.4 day month. Such additional Gained Time shall not be subject to forfeiture for misbehavior and shall be the equivalent of 12.55% of the remaining sentence.

(3) Gained Time III. In addition to regular Good Time of 8.94 days per 30.4 day month, all inmates performing assigned jobs requiring a minimum of 6 hours per day with requirements for special skills or specialized responsibilities such as specialized maintenance, cook, operator, canteen operator, or hospital technical, as well as inmates participating in full-time study release or work release shall be authorized to receive an additional 5.77 days Gained Time for a total of 14.71 days per 30.4 day month. Such

additional Gained Time shall not be subjected to forfeiture for misbehavior and shall be the equivalent of 18.98% of the remaining sentence.

(4) Emergency Gained Time. All inmates who perform work beyond a regular 40 hour work week during extremely inclement weather (below 20 degrees Farenheit—Chill factor), or under emergency conditions shall be compensated on the basis of 1 day of emergency Gained Time for 1 day worked. The length of the day shall be determined by the nature of the work assignment to be performed under the conditions mentioned above. Such Gained Time shall be reported separately on the history card attachment (flimsy) and shall not be subjected to forfeitures for misbehavior.

History Note: Statutory Authority G.S. 148.11; Effective February 1, 1976.

.0103 PROCEDURE

(a) Recording Time Earned. Only Good Time will be computed automatically on the inmate's record in the Data Processing Section. Initiation of Gained Time status in categories number I, II, and III must be initiated by the unit superintendent or institution head using the history card attachment (flimsy).

(b) Transfer. When an inmate is transferred, Gained Time status in categories number I, II, and III is automatically terminated. Use of the history card attachment (flimsy) is not necessary to terminate Gained Time status in categories number I, II, and III when an inmate is transferred from the unit or institution.

(c) Emergency Gained Time. Under the conditions mentioned above, Emergency Gained Time must be reported on the history card attachment (flimsy) by reporting the actual number of days worked.

(d) Meritorious Gained Time. The Director of Prisons may award additional Gained Time to an inmate for exceptionally meritorious behavior. Meritorious Gained Time shall not be subject to forfeiture.

(e) Restoration of Good Time. Regular Good Time forfeited through disciplinary action may be restored by administrators and institution heads. Not more than 30 days of regular Good Time may be restored per month. Any singe restoration of regular Good Time of more than 30 days shall be at the discretion of the Director of the Division of Prisons.

History Note: Statutory Authority G.S. 148.13;
Effective February 1, 1976.

North Carolina Department of Correction, *Rules and Policies Governing the Management and Conduct of Inmates Under the Control of the Division of Prisons* (rev. Mar. 1976) (excerpt)

3. SENTENCE REDUCTIONS

Good Time—All inmates, including committed youthful offenders and inmates with life terms, shall be allowed a maximum of 107 days reduction in sentence for acceptable behavior for each year served. This is called good conduct time and is subject to forfeiture for unacceptable behavior through appropriate disciplinary action.

Gained Time—Additional gained time may be earned as follows:

(1) An additional reduction of 6.89% of the remaining sentence by acceptable performance of short-term work assignments (requiring a minimum of 4 hours of actual work per day) or for participation in on-site academic and vocational training programs.

(2) An additional reduction of 12.55% of the remaining sentence for acceptable job performance requiring a minimum of 6 hours of actual work per day or for part-time release or study release assignments.

(3) Additional reduction of 18.98% of the remaining sentence for the performance of job skills requiring a minimum of 6 hours actual work per day with requirements for special skills or specialized responsibilities as well as inmates participating in full-time study release or work release assignments.

Emergency Gained Time—The Secretary of Correction may authorize additional gained time for actual work performed beyond the regular 40-hour actual work week or during extremely inclement weather or under emergency conditions on the basis of 1 day of emergency gain time for 1 day worked.

All gained time provided hereunder shall be computed on each sentence independently of that earned on any other sentence.

5 N.C. Admin. Code 2B.0100 (1983)

SUBCHAPTER 2B—INMATE CONDUCT RULES, DISCIPLINE

SECTION .0100—GOOD TIME AND GAINED TIME

.0101 PURPOSE

This policy establishes a method of computing good time for acceptable behavior, and gained time for behavior which would not normally be required of an inmate confined within any of the facilities within any of the division of prisons, a jail, or a district confinement facility. This policy applies to inmates confined in any facility of the Division of Prisons of the North Carolina Department of Correction, jail, district confinement facility, "County Farm," or any other local confinement facility established for the incarceration of convicted offenders.

History Note: Statutory Authority G.S. 148.11; 148-13; 15A-1340.7
Eff. February 1, 1976;
Amended Eff. February 1, 1982; February 23, 1981.

.0102 GOOD TIME

(a) Regular Good Time. Good Time at the rate of 12 days for each month shall be allowed the following categories of inmates: all inmates sentenced for crimes committed before July 1, 1981; all inmates sentenced for misdemeanors, whether the misdemeanor was committed before or after July 1, 1981; and all inmates sentenced to life imprisonment upon conviction of a Class C felony under Chapter 15A, Article 81A of the General Statutes.

(b) Fair Sentence Good Time. Excepting those life-term inmates who were convicted of Class A, B or C felonies as provided by Chapter 15A, Article 81A of the General Statues, inmates sentenced for felonies that are committed on or after July 1, 1981, shall receive Fair Sentence Good Time credit at the rate of one day deducted from his prison or jail term for each day he spends in custody without a major infraction of prison conduct rules.

(c) Forfeiture. Good Time, both Regular and Fair Sentence, shall be subject to forfeiture by appropriate disciplinary action for major infractions. Good Time forfeited through disciplinary actions may be restored by Administrators, Institution Heads, and lcoal confinement authorities. Not more than 30 days of Good Time may be restored per month. Any single restoration of Good Time of more than 30 days shall be at the discretion of the Director of the Division of Prisons, and, in the case of inmates locally confined, the Sheriff or Administrator of a district confinement facility.

History Note: Statutory Authority G.S. 148.11; 148-13; 15A-1340.7
Eff. February 1, 1976;
Amended Eff. February 1, 1982; February 23, 1981.

.0103 GAIN TIME

(a) Regular Gain Time. Inmates in the categories defined by .0102(a) who perform work, whether full-time or part-time, or participate in specific training programs which would assist in their productive reentry into the community, shall be allowed additional Gain Time which shall be regulated as Regular Gain Time I, II, and III. Regular Gain Time shall not be sub-

ject to forfeiture for misconduct and will be administered as follows:

(1) Regular Gain Time I. In addition to the 12 days per month of Regular Good Time, inmates who perform short-term work assignments and/or who participate in specific training programs (requiring a minimum of 4 hours of productive activity per day) shall be eligible to receive an additional 2 days per month Gain Time for a total of 14 days per month.

(2) Regular Gain Time II. In addition to the Regular Good Time of 12 days per month, all inmates who satisfactorily perform job assignments &/or who participate acceptably in specific training programs requiring a minimum of 6 hours per day shall be allowed an additional 4 days Gain Time for a total of 16 days per 30 day month.

(3) Regular Gain Time III. In addition to Regular Good Time of 12 days per month, all inmates performing assigned jobs with requirements for special skills or specialized responsibilities such as specialized maintenance, cook, equipment operator, canteen operator, or hospital technical, or inmates participating in fulltime specific training programs requiring a minimum of 6 hours per day shall be authorized to receive an additional 6 days of Gain Time for a total of 18 days per 30 day month.

(4) Regular Emergency Gain Time. All inmates who perform work and/or program activities beyond a regular 40 hour work week or work during extremely inclement weather (below 20 degrees Farenheit chill factor), or under emer-

gency conditions shall be compensated on the basis of 1 day of emergency Gain Time for 1 day worked. The length of the day shall be determined by the nature of the work assignment to be performed under the conditions mentioned above. Such Gain Time shall be reported separately on the history card attachment (flimsy) and shall not be subjected to forfeitures for misbehavior.

(b) Fair Sentence Gain Time. Inmates in the category defined by .0102(b) shall be allowed additional Gain Time, not subject to forfeiture for misconduct, which shall be regulated as Fair Sentence Gain Time I, II, and III, and administered as follows:

(1) Fair Sentence Gain Time I. In addition to the Fair Sentence Good Time credit authorized by .0102(b), prisoners who perform short-term work assignments (requiring a minimum of 4 hours of actual work per day) shall receive credit for work performed at the rate of 2 days per month.

(2) Fair Sentence Gain Time II. In addition to the Fair Sentence Good Time credit authorized by .0101(c), prisoners who perform job assignments requiring a minimum of 6 hours work per day or who perform in part-time work release programs shall receive credit at the rate of 4 days per month.

(3) Fair Sentence Gain Time III. In addition to the Fair Sentence Good Time credit authorized by .0101(c), prisoners who perform job assignments requiring a minimum of six hours per day with requirements for specialized skills or specialized responsibilities, as well as inmates

participating in full time work release, shall receive credit at the rate of 6 days per month.

(4) Fair Sentence Emergency Gain Time. Inmates in the category defined by .0102(c) may receive Emergency Gain Time compensation as set forth in .0103(a)(4), not to exceed 30 days for any month. Time may be awarded at the discretion of the Director of the Division of Prisons, the sheriff, or administrator of a district confinement facility.

(c) Meritorious Gain Time. The Director of Prisons may award sentence reduction credits to an inmate who demonstrates exemplary behavior. Recommendations for the award of meritorious time shall be forwarded to the Director of Prisons by the appropriate area or institutional manager. Each recommendation for a meritorious time adjustment shall be accompanied with the supporting justification. Meritorious sentence reduction credits shall be at the sole discretion of the Director of Prisons, sheriff or administrator of a district confinement facility. An award of sentence reduction credits for meritorious conduct shall not exceed 30 days for each act of meritorious conduct.

History Note: Statutory Authority G.S. 148.11; 148-13; 15A-1340.7
Eff. February 1, 1976;
Amended Eff. February 1, 1982; February 23, 1981.

.0104 PROCEDURE

(a) Recording Time Earned. Only Good Time will be computed automatically on the inmates' record. Initiation of Gain Time status, and Fair Sentence Gain Time status must be initiated by the Unit Superinten-

dent, Institution Head, or local confinement authority using the history card attachment (flimsy) in the case of inmates confined in the Division of Prisons, or other appropriate record in the case of inmates locally confined.

(b) Transfer. When an inmate is transferred, Regular Gain Time status, and Fair Sentence Gain Time status is automatically terminated.

(c) Emergency Gain Time. Under the conditions mentioned in this Rule, Emergency Gain Time must be recorded on the history card attachment (flimsy) in the case of inmates incarcerated in the Division of Prisons reporting the actual number of days worked.

History Note: Statutory Authority G.S. 15A-1340.7; 148.11; 148-13;
Eff. February 1, 1982.

.0105 PAROLE ELIGIBILITY DATES

(a) Except for persons who were convicted of class A or B felonies, when a parole eligibility date has been established for any inmate, then that eligibility date may be reduced by crediting the date with appropriate good time, in the proportions and manner as provided for by applying "Regular Good Time" credit as defined herein by 5 NCAC 2B .0102(a).

(b) Forfeiture. Regular Good Time that has been applied to a parole eligibility date may be forfeited upon conviction of a major disciplinary offense in the same manner as provided herein by 5 NCAC 2B .0101(d). Forfeited Regular Good Time may be restored and credited against a parole eligibility date as also provided by 5 NCAC 2B .0102(c).

History Note: Statutory Authority G.S. 15A-1355(c); 148.11; 148-13;
Eff. February 1, 1982.

North Carolina Department of Correction, Division of Prisons, Policies—Procedures, *Sentence Reduction Credits*, Apr. 1, 1995

[header: TAB 5 NCAC 2B, INMATE CONDUCT RULES, DISCIPLINE; NO. .0100; footer: ISSUED BY: DIR. DOP; APPROVED BY: SEC. OF CORR.; DATE ISSUED: 04/01/95; SUPERSEDES ISSUE DATED: 11/01/95]

.0101 PURPOSE

History Note: Filed as a Temporary Repeal Eff. November 15, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Statutory Authority G.S. 15A-1340.7; 148-11; 148-13;
Eff. February 1, 1976;
Amended Eff. November 1, 1991; September 1, 1983; February 1, 1982; February 23, 1981;

.0102 GOOD TIME

.0103 GAIN TIME

History Note: Filed as a Temporary Amendment Eff. March 21, 1987 for a period of 43 days to expire on May 1, 1987;
Filed as a Temporary Amendment Eff. April 1, 1983 for a period of 60 days to expire on June 1, 1983;
Statutory Authority G.S. 148-11; 148-13; 15A-1340.7;
Eff. February 1, 1976;

Amended Eff. November 1, 1991; May 1, 1987; October 1, 1985; September 1, 1985;
Repealed Eff. January 1, 1994 Pursuant to 1991 S.L., c. 477, s. 3.

.0104 PROCEDURE

.0105 PAROLE ELIGIBILITY DATES

History Note: Statutory Authority G.S. 15A-1340.7; 15A-1355(c); 148-11; 148-13;
Eff. February 1, 1982;
Amended Eff. November 1, 1991; August 1, 1986; April 1, 1985; September 1, 1985;
Repealed Eff. January 1, 1994 Pursuant to 1991 S.L., c. 477, s. 3.

.0106 SPLIT SENTENCES

History Note: Filed as a Temporary Repeal Eff. November 15, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Statutory Authority G.S. 15A-1340.7; 148-11; 148-13;
Eff. April 1, 1985;
Repealed Eff. February 1, 1995.

.0107 MANDATORY MINIMUM SENTENCES UNDER THE SAFE ROADS ACT

History Note: Statutory Authority G.S. 15-196.1; 20-179(p); 148-13;
Eff. April 1, 1985;
Repealed Eff. January 1, 1994 Pursuant to 1991 S.L., c. 477, s. 3.

.0108 CRIMINAL CONTEMPT

History Note: Filed as a Temporary Repeal Eff. November 15, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Statutory Authority G.S. 5A-12(c); 148-13;
Eff. April 1, 1985;
Repealed Eff. February 1, 1995.

.0109 SCOPE

This Section establishes a method of computing sentence reduction credits in the form of Good Time for satisfactory behavior, Gain Time and Earned Time for participation in work or program assignments, and Meritorious Time for behavior or specific acts not normally required of an inmate. This rule applies to inmates sentenced to the custody of the Department of Correction for confinement in its facilities and sentenced jail prisoners.

History Note: Filed as a Temporary Adoption Eff. November 15, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Statutory Authority G.S. 15A-1340.7; 15A-1340.13; 15A-1340.20; 15A-1355; 148-11; 148-13;
Eff. February 1, 1995.

.0110 DEFINITIONS

The following definitions apply whenever these terms are used in this Chapter:

(1) Good Time—Good time is credit for good behavior at the rate of one day deducted from an eligible inmate's sentence for each day he spends in custody without a major infraction of prisoner conduct rules.

(2) Gain Time—Gain time is sentence reduction credit for participation in work and program activities awarded to eligible inmates sentenced for crimes committed prior to October 1, 1994.

(3) Earned Time—Earned time is sentence reduction credit awarded to inmates for participation in work and program activities and is applicable to inmates sentenced under the Structured Sentencing Act.

(4) Eligible Inmates—Inmates eligible to earn sentence reduction credits as outlined in Rules .0111, .0112 , .0113 and .0114 of this Section.

(5) Meritorious Time—Meritorious time is sentence reduction credit awarded to eligible inmates for acts of exemplary conduct or work under extraordinary conditions.

(6) Sentence Reduction Credits—Time credits applied to an inmate's sentence that reduce the amount of time to be served. Included are good time, gain time, earned time and meritorious time.

(7) Fair Sentencing Act—Also known as presumptive sentencing, this sentencing act applies for felonies committed from July 1, 1981 through September 30, 1994.

(8) Structured Sentencing Act—This sentencing act determines the sentence received for

crimes, except impaired driving offenses, committed on or after October 1, 1994.

(9) Inmate Misconduct—Inmate disobedience to a lawful order of the Department of Correction, its agents or employees.

(10) Parole Eligibility Date—The date, if any, provided to the Department of Correction by the Parole Commission as the date an inmate becomes eligible for parole.

History Note: Filed as a Temporary Adoption Eff. November 15, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Statutory Authority G.S. 15A-1340.7; 15A-1355; 148-11; 148-13.
Eff. February 1, 1995.

.0111 GOOD TIME

(a) Inmates shall be awarded Good Time at the rate of one day deducted from the inmate's prison or jail term for each day the inmate spends in custody without an inmate disciplinary infraction.

(b) Forfeiture. Good Time shall be subject to forfeiture through disciplinary action for inmate misconduct. The amount of Good Time lost for inmate misconduct shall not exceed the amount of good time the inmate had earned to date.

(c) Restoration of Forfeited Good Time. Good Time forfeited through disciplinary action may be restored by facility superintendents; area administrators; institution heads; and, in the case of inmates confined to local confinement facilities, the sheriff or administrator of a regional confinement facility. Such restoration

shall be based upon incidents of improved behavior by the inmate as determined by the judgment of the superintendent, facility administrator, or his designee. Restoration of lost Good Time cannot exceed the total time previously forfeited.

(d) The following inmates are not eligible for good time as a sentence reduction credit:

(1) Inmates sentenced under the Structured Sentencing Act;
(2) Inmates committed to custody for contempt of court;
(3) Health law violators;
(4) Inmates sentenced under the Fair Sentencing Act for Class A and B felonies;
(5) Inmates serving an active prison term followed by a period of Special Probation;
(6) Safekeepers; and
(7) Presentence commitment for study defendants.

History Note: Filed as a Temporary Adoption Eff. November 15, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Statutory Authority G.S. 5A-12(c); 15A-1340.7; 130A-25; 148-11; 148-13;
Eff. February 1, 1995.

.0112 GAIN TIME

(a) Gain Time. Inmates who perform work, whether full-time, or part-time, or participate in training programs which would assist their productive reentry into the community, shall be allowed sentence re-

duction credits which shall be regulated as Gain Time I, II, and III. Gain Time shall be administered as follows:

(1) Gain Time I. In addition to Good Time credits, inmates who perform work assignments or who participate in training programs, which are designated for Gain Time I and require a minimum of four hours of productive activity per day, for the number of days per month assigned to participate, shall receive credit at the rate of two days per month.

(2) Gain Time II. In addition to Good Time credits, inmates who perform job assignments or who participate in training programs, which are designated for Gain Time II and require a minimum of six hours participation per day, for the number of days per month assigned to participate, shall receive credit at the rate of four days per month.

(3) Gain Time III. In addition to Good Time credits, inmates performing assigned jobs with requirements for special skills or specialized responsibilities such as specialized maintenance, cook, equipment operator, canteen operator, hospital technician, who participate in full-time training programs, which are designated for Gain Time III and require a minimum of six hours participation per day, for the number of days assigned to participate, shall receive credit at the rate of six days per month.

(b) Forfeiture. Gain time shall not be subject to forfeiture for inmate misconduct.

(c) The following inmates are not eligible for gain time as a sentence reduction credit:

(1) Inmates sentenced under the Structured Sentencing Act;
(2) Inmates committed to custody for contempt of court;
(3) Health law violators;
(4) Inmates sentenced under the Fair Sentencing Act for Class A and B felonies;
(5) Inmates serving an active prison term followed by a period of Special Probation;
(6) Safekeepers; and
(7) Presentence commitment for study defendants.

History Note: Filed as a Temporary Adoption Eff. November 15, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Statutory Authority G.S. 5A-12(c); 15A-1340.7; 130A-25; 148-11; 148-13;
Eff. February 1, 1995.

.0113 EARNED TIME

* * *

.0114 MERITORIOUS TIME

(a) All inmates eligible for gain time or earned time are eligible for Meritorious Time sentence reduction credit awards. The Director of Prisons or his designee awards Meritorious Time sentence reduction credit to deserving inmates, as determined by his judgment.

(b) Total credit awards to misdemeanants sentenced for crimes occurring on or after October 1, 1994, shall not exceed four days per month for the total number of months sentenced to incarceration. Credit

awards for felons sentenced for crimes occurring on or after October 1, 1994, shall not reduce the felon's maximum term below the minimum term.

(c) Credit awards to inmates eligible for gain time sentenced for crimes occurring prior to October 1, 1994, shall not exceed 30 days per month for work performed nor 30 days for each act of exemplary conduct.

(d) Consideration for Meritorious Time awards will be based upon the following categories:

(1) Work Performed.

(A) Overtime. Overtime is defined as satisfactory performance, as determined in the judgment of the supervisor, in a job activity beyond a regular 40-hour work week. Inmates assigned to the Work Release Program are not eligible to receive overtime based on a work release job.

(B) Adverse working Conditions. Inmates are eligible for additional sentence reduction credit for work performed during inclement weather. Inclement weather is defined as a chill factor of below 20 degrees Fahrenheit of temperature above 95 degrees Fahrenheit. Such conditions include rain, sleet, snow, or other unusual or abnormal circumstances as determined by the appropriate approving authority.

(C) Emergency Conditions. Inmates are eligible for additional sentence reduction credits for work performed during emergency conditions. Facility Super-

intendents will determine when an emergency condition exists. Such emergency conditions may include, but are not limited to, power failures, forest fires, work stoppages, riots, statewide emergencies established by the State Emergency responses network.

(2) Exemplary Conduct.

(A) Inmates are eligible for additional sentence reduction credit, not to exceed 30 days for each act, based upon the performance of an act which in the professional judgment of the Director of his designee is exemplary and merits the award of sentence reduction credits.

(B) Inmates attaining an educational degree are eligible for additional sentence reduction credit at a rate of 30 days per achievement. These awards are limited to successful completion of the General Educational Development Test (GED), receipt of a vocational trades license or trades certification based on successful completion of a formal program of vocational course work and supervised training, the attainment of an Associate of Arts or Science Degree (AA, AS), or the achievement of a Bachelor of Arts or Science Degree (BA, BS) or Graduate Degree (MA, MS, Ph.D., etc.). Inmates identified as special students by educational authorities may be awarded an additional five days per month for pro-

gress towards established educational goals in keeping with their individual education plans.

History Note: Filed as a Temporary Adoption Eff. November 15, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Statutory Authority G.S. 15A-1355; 148-11; 148-13;
Eff. February 1, 1995.

State of North Carolina Department of Correction, Division of Prisons, Policy and Procedure

Chapter: B
Section: .0100
Title: **Sentence Reduction Credits**
Issue Date: 10/05/07
Supersedes: 08/01/07

.0109 SCOPE

This section establishes the rules and methods for computing sentence reduction credits in the form of Good Time for satisfactory behavior, Gain and Earned Time for participation in work or program assignments, and Meritorious Time for exemplary acts or for working under emergency conditions, and working overtime or for program achievement. These rules apply to offenders sentenced to the custody of the Department of Correction for confinement in its facilities and sentenced jail prisoners. This policy does not establish procedures for parole eligibility.

.0110 DEFINITIONS

The following definitions apply whenever these terms are used in this Chapter:

(a) Good Time—Good time is sentence reduction credit awarded, at the rate of one day deducted for each day served in custody for good behavior and/or without an infraction of inmate conduct rules, to eligible inmates sentenced for crimes committed prior to October 1, 1994. Inmates convicted of Driving While Impaired, regardless of offense date, will be eligible for good time on that sentence only. For inmates sentenced under the Fair Sentencing Act, Good Time reduces the time required to be served for unconditional release from prison.

(b) Gain Time—Gain time is sentence reduction credit that is awarded to eligible inmates sentenced for crimes committed prior to October 1, 1994, for their participation in full time work and/or program activities.

(c) Earned Time—Earned time is sentence reduction credit awarded to eligible inmates, who are sentenced for crimes committed on or after October 1, 1994, or who are sentenced under the Structured Sentencing Act, for their participation in full time work and program activities.

(d) Meritorious Time—Meritorious Time is sentence reduction credit that is awarded to eligible inmates for their exemplary acts or for working under emergency conditions for working overtime, working in inclement weather and for achievements in apprenticeship training, educational or other type programs.

(e) Eligible Inmates—Inmates eligible to earn sentence reduction credits as outlined in sections .0111, .0112, .0113, .0114, .0115, .0116, and .0117 of this policy.

(f) Sentence Reduction Credits—Time credits applied to an inmate's sentence that reduces the amount of time to be served. These credits are called Good Time, Gain Time, Earned Time and Meritorious Time.

(g) Fair Sentencing Act—Also known as presumptive sentencing, this sentencing act applies to felonies committed from July 1, 1981 through September 30, 1994.

(h) Structured Sentencing Act—This sentencing act determines the sentence received for crimes, ex-

cept impaired driving offenses, committed on or after October 1, 1994.

(i) Inmate Misconduct—violation of inmate conduct rules and/or disobedience to a lawful order of the Department of Correction, its agents or employees.

(j) Parole Eligibility Date—The date, provided to the Division of Prisons by the Parole Commission as the date an inmate becomes eligible for parole.

.0111 GOOD TIME

This section applies to inmates sentenced as felons for crimes they committed prior to October 1, 1994 and inmates convicted of Driving While Impaired, regardless of offense date.

(a) Inmates are awarded Good Time at the rate of one day deducted from their prison or jail term for each day they spends in custody without a violation of inmate conduct rules.

(b) Forfeiture. Good Time shall be subject to forfeiture when the inmate is found guilty of violating inmate conduct rules. The amount of Good Time lost for inmate misconduct shall not exceed the amount of good time the inmate has earned to date.

(c) Restoration of Forfeited Good Time will occur as established in .0115.

(d) The following inmates are not eligible for good time as a sentence reduction credit:

(1) Inmates sentenced under the Structured Sentencing Act;
(2) Inmates committed to custody for contempt of court;
(3) Health law violators;

(4) Inmates sentenced under the Fair Sentencing Act for Class A & B felonies and inmates serving a life sentence for a Class C felony;
(5) Inmates serving an active prison term followed by a period of Special Probation;
(6) Safekeepers; and
(7) Inmates committed for a Presentence Diagnostic Study.

.0112 GAIN TIME

(a) Gain Time. Gain Time is sentence reduction credit awarded to eligible inmates, who are serving sentences for crimes they committed prior to October 1, 1994, for their participation in work and/or program activities. Inmates who work full-time, or participate in full-time programs which would assist their productive re-entry into the community, shall be allowed sentence reduction credits which shall be regulated as Gain Time I, II, and III or as Meritorious Time, as provided in section .0114 of this policy, with exceptions as noted under (c) below. Gain Time shall be administered and assigned as follows:

(1) Gain Time I. In addition to Good Time credits, inmates who perform work assignments or participate in full time programs that are rated as Gain Time I may receive an additional two days per month, deducted from their sentence. A Gain Time I rating requires the inmate to be engaged in a minimum of four hours of unskilled or low level activity per day, but not to exceed six hours per day and to participate for the number of days per week as required by the assignment.

(2) Gain Time II. In addition to Good Time credits, inmates who perform work assignments or participate in full time programs that are rated as Gain Time II may receive an additional four days per month deducted from their sentence. A Gain Time II rating requires the inmate to be engaged in a minimum of four hours per semi-skilled or moderate level activity per day, but not to exceed eight hours per day, and to participate for the number of days per week as required by the assignment.

(3) Gain Time III. In addition to Good Time credits, inmates who perform work assignments or participate in full time programs that are rated as Gain Time III may receive an additional six days per month deducted from their sentence. A Gain time III rating requires the inmate to be engaged in a minimum of six hours of skilled or high level activity per day, but not to exceed eight hours per day, and to participate for the number of days per week as required by the assignment.

(b) Forfeiture. Under the Fair Sentencing Act, Gain Time shall not be subject to forfeiture for inmate misconduct.

(c) The following inmates are not eligible for gain time as a sentence reduction credit:

(1) Inmates sentenced under the Structured Sentencing Act;
(2) Inmates committed to custody for contempt of court;
(3) Health law violators;

(4) Inmates sentenced under the Fair Sentencing Act for Class A and B felonies and inmates serving a life sentence for a Class C felony;
(5) Inmates serving an active prison term followed by a period of Special Probation;
(6) Safekeepers; and
(7) Inmates committed for a Presentence Diagnostic Study.

.0113 EARNED TIME

* * *

.0114 MERITORIOUS TIME

(a) All inmates who are eligible for Gain or Earned Time are also eligible for Meritorious Time sentence reduction credit awards. The Facility Head or his/her designee awards Meritorious Time sentence reduction credits to eligible inmates as guided by this policy.

(b) Total credit awards to misdemeanants for crimes occurring on or after October 1, 1994 shall not exceed four days per month for the total number of months of incarceration. Credit awards for felons sentenced for crimes occurring on or after October 1, 1994, shall not exceed 30 days per month for work performed nor 30 days for each act of exemplary conduct and cannot reduce the felon's period of incarceration below the minimum term.

(c) Total Sentence Reduction Credit awards for eligible felons sentenced for crimes occurring prior to October 1, 1994, shall not exceed 30 days per month for work performed or program participation, nor shall it exceed 30 days per month for each act of exemplary conduct.

(d) Eligible inmates may be awarded Meritorious Time credit for working overtime, working in inclement weather, apprenticeship training, and for program and educational achievements. Meritorious Time credit awards for an inmate that exceeds 30 days, either through a single or combination of awards during a calendar month, must be approved by the Director of Prisons or his/her designee.

(e) Consideration for Meritorious Time Awards will be guided by and based upon the following categories:

(1) Exemplary Acts and Emergency Conditions

(A) Meritorious Time Awards for Exemplary Acts. Meritorious Time Awards for exemplary acts may be authorized by the facility head but may not exceed thirty days for each act. Exemplary acts are to be construed as acts that demonstrate going well above or beyond the normal expectations and for acts of heroism. Meritorious Time should not be awarded for routine job performance, or as compensation for hours worked overtime or for educational and program achievements.

(B) Emergency Conditions. Inmates are eligible for Meritorious Time Awards of sentence reduction credit for work performed during emergency conditions. Facility Heads will determine when an emergency condition exists. Such emergency conditions may include, but are not limited to, power failures, forest fires, work stoppages, riots, and statewide emergencies as established by the State Emergency response network or the Governor.

(2) Work Performed.

(A) Overtime. Inmates are eligible to receive Meritorious Time for hours worked overtime. Overtime is defined as satisfactory performance, as determined in the judgement of the supervisor, in a regular job activity or a special assignment, beyond a regular 40-hour work week. The calculation for Overtime credit award is eight (8) hours equals one (1) day of sentence reduction credit. Inmates assigned to the Work Release Program are not eligible to receive Meritorious Time for hours worked overtime ~~based~~ on a work release job.

(B) Inclement Weather. Inmates are eligible for Meritorious Time sentence reduction credit for working in inclement weather. Inclement weather is defined as a chill factor of below 20 degrees Fahrenheit or temperature above 95 degrees Fahrenheit. Also, such conditions as rain, sleet, snow, or other unusual or abnormal circumstances may be determined by the appropriate facility head to meet the requirements of this policy.

(C) Apprenticeship Program. Inmates are eligible for Meritorious Time for achievements in Apprenticeship Training. Only inmates participating in an Apprenticeship Training that has been rated and approved as an Apprenticeship Program by the Chief of Program Services, has been certified by the North Carolina Department of Labor (NCDOL) and has been issued an Appren-

tice Agreement form (AOP 4.09.03-Rev1) by the NCDOL, will be eligible to receive sentence reduction credits for their achievements. Inmates may be awarded 15 days Meritorious Time for each successful completion of 500 hours of On the Job Training (OJT) in the Apprenticeship Program. Inmates may be awarded 30 days of Meritorious Time sentence reduction credits for each successful completion of the Journeyman certification in the Apprenticeship Program and/or the successful completion of the Master Craftsman certification in the Apprenticeship Program.

(3) Educational Program Completion.

(A) Inmates are eligible for Meritorious Time sentence reduction credit, not to exceed 30 days for an educational achievement. The education achievement must be commendable and therefore merits the award of Meritorious Time as determined and established in the professional judgment of the Chief of Program Services.

(B) Inmates are eligible for Meritorious Time sentence reduction credit not to exceed 30 days for each degree achieved. The awarding of sentence reductions credits for the attainment of an education degree is limited to successful completion of the General Educational Development Test (GED), the attainment of an Associate of Arts or Science Degree (AA, AS), or the achievement of a Bachelor of Arts or Science Degree

(BA, BS) or Graduate Degree (MA, MS, Ph.D., etc.).

(C) Inmates are eligible for Meritorious Time sentence reduction credit for achievement of a vocation diploma or certificate. Inmates who complete a Community College curriculum vocational program resulting in a diploma or curriculum certificate are eligible for Meritorious Time sentence reduction credits at a rate of 15 days per achievement.

(D) Inmates who complete a Community College continuing education vocational program resulting in a certificate of completion are eligible for Meritorious Time sentence reduction credits at a rate of 5 days per achievement.

(E) Inmates identified as special students by educational authorities may be awarded 5 days Meritorious Time per month for progress towards established educational goals in keeping with their educational plans.

(4) Other Program Completion and/or Achievement

Inmates who complete and/or obtain other program achievements may receive Meritorious Time only as authorized and designated by the Chief of Program Services.

(f) Forfeiture of Meritorious Time. Meritorious Time is subject to forfeiture through disciplinary action for inmate misconduct for those inmates sentenced under the Fair Sentencing or the Structured Sen-

tencing Act. The amount of Meritorious Time lost for inmate misconduct shall not exceed the amount of time the inmate has earned to date.

.0115 RESTORATION OF FORFEITED GOOD TIME, EARNED TIME, AND MERITORIOUS TIME

(a) Sentence reduction credits forfeited through disciplinary action may be restored by facility heads; and in the case of inmates confined to local confinement facilities, the sheriff or administrator of a regional confinement facility. Such restorations shall be based upon incidents of improved behavior by the inmate. Restoration of forfeited time cannot exceed the total time lost.

(b) Each facility will post an Inmate Notice in areas accessible by all inmates to ensure all inmates are familiar with the requirements for restoration.

(c) Restoration of forfeited sentence reduction credits will be based on an inmate remaining infraction free for a specific period of time and may require compliance with an established case management plan. An inmate shall not be penalized if there are not sufficient jobs or programs at the assigned location, but the inmate must be on a waiting list for a job or program to have time restored.

(d) The waiting period for restoration of lost time is as follows:

(1) Class A infractions: Any sentence reduction credit forfeited as a result of an A class disciplinary infraction will not be eligible for restoration.

(2) Class B infractions: An inmate may request restoration after remaining infraction free for

one year from the date of the disciplinary hearing. The request must be in writing to the assigned case manager who will establish a behavior agreement specifying the amount of time to be restored each month, as well as the jobs/programs the inmate must either be participating in or awaiting assignment to in order to be restored. Facility staff must enter the restored time in OPUS using the Sentence Credit/Penalty screen (OT61).

(3) Class C or D infractions: Sentence reductions credits forfeited due to C or D class infractions will be automatically restored after six months if the inmate has incurred no additional rule violations. OPUS will restore the credits in increments not to exceed 10 days per month. This automated process will apply to infraction(s) with an applied date on or after August 1, 2007. Restoration of time for infraction(s) occurring before August 1, 2007, must be requested in writing by the inmate and if approved, staff must enter in OPUS using the Sentence Credit/Penalty screen (OT61). Additional credits may be restored if the inmate makes a request in writing to the assigned case manager who will establish a behavior agreement specifying the amount of time to be restored each month, as well as the jobs/programs the inmate must either be participating in or awaiting assignment to in order to be restored.

(e) Restored Time Limits: The rate of restoring forfeited time for classes B, C and D will be at a rate not to exceed 30 days per month. No restorations of sentence reduction credits shall occur to reduce

an inmate's release date to less than 30 days from the current date.

.0116 PROCEDURES

(a) Recording Sentence Reduction Credits

(1) Good Time. Good Time awarding is automatically managed through the OPUS system.

(2) Gained or Earned Time. Gain or Earned time is automatically managed through the OPUS system when the responsible staff properly records an inmate's activity assignment in the OPUS system.

(3) Meritorious Overtime. Meritorious Overtime awarded as compensation for hours worked overtime, is recorded and accumulated on an hour for hour basis and submitted in whole days defined as eight hours. Overtime records and the meritorious overtime award process will be automatically managed through the automated OPUS system. However, staff are responsible to ensure that inmates do not receive more than two (2) days per week of Meritorious Overtime sentence reduction credits on a consistent and frequently reoccurring basis for work assignments that have been established as a seven (7) day, eight (8) hour a day assignment. It is essential that the staff person, who is responsible for entering the number of hours worked by an inmate, enters the actual number of hours worked by the inmate. Staff should not enter the established hours for the work assignment when the inmate did not work.

(4) Meritorious Acts. Time Credits for Meritorious Acts and Emergency Conditions are processed following recommendations by facility staff. The Facility Head or designee reviews and approves Meritorious Act credit recommendations that do not exceed 30 days or when the award does not cause the total amount of sentence reduction credit the inmate has received during a calendar month to exceed 30 days. Awards that exceed 30 days must be approved by the Director of Prisons or his/her designee. The recommendation, review, and final action are recorded on the OPUS Sentence Reduction Credit Award screens (OT60 and OT61).

(b) Recommendations and Submissions

Recommendations for sentence reduction credit awards will be entered only by the facility where the inmate is housed. Sentence reduction credits may be awarded only to inmates who are currently serving sentences in the Division of Prisons or who are serving prison sentences but are housed in jail facilities or other contractual housing facilities. Recommendations for sentence reduction credit awards for inmates who are being housed temporarily in a prison or other type facility will be forwarded to the facility of permanent or regular housing for the inmate. The prison facility of permanent or regular housing for the inmate will receive, review, approve/disapprove and appropriately process their final actions. Receiving facilities will manage awards earned through the automated OPUS system.

(c) Local Confinement Facilities

When inmates are assigned to local confinement facilities or jails pursuant to Court Commitment, the Sheriff or Administrator of the local confinement facility shall establish procedures for granting, approving, and documenting sentence reduction credit awards. In the case of inmates confined to local confinement facilities or jails pursuant to a contractual agreement with the Department of Correction, the Sheriff or Administrator shall forward recommendations for sentence reduction credit awards to the Chief of Program Services or designee for final review and action as appropriate.

(d) Documentation for authorized sentence reduction credit awards for inmates in the custody of the Division of Prisons shall be recorded, reviewed, and final action recorded through the established OPUS system.

(e) Approving Authorities. Sentence reduction credit awards are subject to review and approval as follows:

(1) Facility heads or designee shall have the authority to approve sentence reduction credit awards, including the restoration of previously lost sentence reduction credits, not to exceed thirty days per month.

(2) All meritorious time recommendations and all recommendations for restoration of previously forfeited good time, earned time or merit time awards which exceed thirty days in a month must be submitted to the Director or Director's Designee for final approval.

.0117 GAIN and EARNED TIME CREDIT FOR MEDICALLY AND PHYSICALLY UNFIT INMATES

(a) When a determination has been made by a Department of Correction medical authority that an inmate is unable to engage in any available work or programs or other assignments due to a medical/mental health condition or a physical disability, the inmate is designated as medically unfit and is granted sentence reduction credits at the rate of four (4) days per month that is awarded as Gain or Earned Time.

(b) For the purposes of this policy, medically unfit shall be defined as inmates designated in Acuity Level 4, PULHEAT Activity Grade 4 or 5, and Mental Health Grade 4. Sentence Reduction credits will continue for identified inmates if transferred to a community hospital for treatment purposes.

(c) Medically unfit status continues until a medical authority determines that the medical/mental health condition or physical disability no longer prevents assignment to work or other activities.

(d) An inmate who is limited for some but not all work or program activities is given an available assignment appropriate to his or her medical/mental health condition and physical disability. The inmate is awarded sentence reduction credits based on his/her assignment, and is not designated as medically unfit.

(e) The following inmates are not designated as medically unfit:

(1) An inmate who refuses to participate in work or other assignments that is ~~are~~ appropriate for

his or her medical/mental health condition and physical disability.

(2) An inmate whose medical/mental health condition or physical disability is the result of self-injurious behavior while in prison.

(3) An inmate on a control or segregation status (other than protective control).

(f) This policy applies to eligible inmates as described above who are serving sentences under any sentencing act.

/s/ [illegible] 10-25-07
Director of Prisons Date

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(3)

Supreme Court, U.S
FILED
MAR 14 2011
OFFICE OF THE CLERK

No. 10-804

In the

Supreme Court of the United States

ALFORD JONES,

Petitioner,

v.

ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND MICHAEL CALLAHAN, ADMINISTRATOR OF RUTHERFORD CORRECTIONAL CENTER,

Respondents.

FAYE BROWN,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND KENNETH ROYSTER, SUPERINTENDENT OF RALEIGH CORRECTIONAL CENTER FOR WOMEN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the North Carolina Supreme Court erred by holding that petitioners' due process rights were not violated where they were not entitled under state law to the application of good behavior credits toward unconditional release.

2. Whether the North Carolina Supreme Court erred by holding there was no ex post facto violation where petitioners had never earned under state law any good behavior credits toward unconditional release.

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STATEMENT

For more than five decades, the North Carolina Department of Correction (hereinafter "DOC"[1]) has acted consistently and in accordance with long-standing state statutes and regulations by never using good behavior credits to calculate unconditional release dates for prisoners sentenced to life imprisonment. Because the DOC Secretary has never exercised the absolute discretion given him by statute to apply credits to life prisoners for this purpose, even those prisoners serving life sentences that must be considered as eighty-year sentences have never been awarded and are not entitled to reduction of their unconditional release dates.

The North Carolina Supreme Court correctly found under state law that Petitioner Alford Jones[2] – who was sentenced to life imprisonment – has no state-created right to have his good behavior credits used to calculate his eligibility for unconditional release inasmuch as "[n]o regulation explicitly provides that credits are to be used to calculate an unconditional release date" for prisoners sentenced to life imprisonment. *Jones v. Keller*, 698 S.E.2d 49, 57 (N.C.

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[1] For ease of reference, respondents throughout are referred to collectively as "DOC."

[2] For clarity and to be consistent with the petition, this brief in opposition refers only to Jones However, the argument also applies to Petitioner Faye Brown's case.

2010). As a result, the court further correctly held that there was no due process or ex post facto violation. This Court should not grant review.

1. Good Behavior Credits in North Carolina. In 1955, the North Carolina General Assembly authorized the Secretary of DOC to establish rules and regulations on "grades of prisoners, rewards and privileges applicable to the . . . classification of prisoners as an inducement to good conduct, [and] allowances of time and privileges for good behavior." N.C. Gen. Stat. § 148-13 (1955). Pursuant to the Secretary's absolute discretion, which remained unchanged from 1955 through 1979, DOC implemented policies and regulations regarding good behavior credits.[3]

None of DOC's policies regarding good behavior credits was codified prior to 1976. (Pet. App. 97a) However, DOC records show that prior to 1976 the Secretary of DOC had utilized the same policy that was later codified. (Pet. App. 98a) That codified regulation, placed in the North Carolina

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[3] Under North Carolina law, good behavior credits generally include credits for "good time," "gain time," and "meritorious time." Good time is awarded for good behavior without infractions of inmate conduct rules, gain time is awarded for work performed, and meritorious time may be awarded for exemplary behavior.

Administrative Code, provided that "[a]ll inmate[s], including . . . those with life terms" would receive "good time" credits "for acceptable behavior" and "[a]ll inmates who perform work" would be allowed "gain time." 5 N.C. Admin. Code 2B.0101, 2B.0102 (1976). (Pet. App. 177a)

The regulation did not specify the purposes for which those credits were to be used. As to prisoners with life sentences, DOC used the credits for the purposes of custody promotions, parole eligibility, and reduction of time to be served if there was a commutation by the Governor. (Pet. App. 98a, 157a) As to other prisoners, DOC also used the credits to calculate unconditional release dates. (Pet. App. 128a-130a)

In 1979, the North Carolina General Assembly created a prospective, limited right to good time credit for some prisoners who were sentenced under the "Fair Sentencing Act." *See* N.C. Gen. Stat. § 148-13 (1979). Outside of the Fair Sentencing Act, no statute speaks to the requirement that credits be given, how they are to be used, or that any credit must be used to calculate an earlier unconditional release.

As for prisoners sentenced for offenses committed prior to the effective date of the Fair Sentencing Act, N.C. Gen. Stat. § 148-13(b) continued to vest in the Secretary of DOC the same absolute discretion he

previously had possessed as to good behavior credits. Indeed, N.C. Gen. Stat. § 148-13(b) in no way required the Secretary to grant good behavior credits toward an unconditional release date or even to issue regulations in that regard. *See Price v. Beck*, 571 S.E.2d 247, 250 (N.C. Ct. App.), *disc. rev. denied*, 575 S.E.2d 26 (N.C. 2002).

After the General Assembly in 1995 exempted DOC from the rule-making provisions of the North Carolina Administrative Procedure Act, DOC included good behavior credits in its definition of "Sentence Reduction Credits" that "applied to an inmate's sentence that reduce the amount of time to be served." North Carolina Department of Correction, Division of Prisons, Policies – Procedures, *Sentence Reduction Credits* § .0110 (1995). Even so, the rule did not require DOC to apply those credits for any specific purpose to prisoners with life sentences.

In 2007, DOC again amended its rule. Although the rule continues to provide that good behavior credits are sentence reduction credits, it was amended to state: "For inmates sentenced under the Fair Sentencing Act, Good Time reduces the time required to be served for unconditional release from prison." State of North Carolina Department of Correction, Division of Prisons, Policy and Procedure § .0110(a) (2007). (Pet. App. 200a-201a) This appears to be the

first and only mention of "unconditional release" in DOC regulations.

Throughout all the amendments to its regulations and rules, DOC has credited all prisoners including those with life sentences with good behavior credits. For those with life sentences, consistent with the discretion given to the DOC Secretary, those credits have been awarded for the limited purposes of reducing the time required to become eligible for custody promotion or parole eligibility or in case of sentence commutation by the Governor. (Pet. App. 131a, 140a, 146a-147a) Policies and rules also were applied to allow prisoners with life sentences to accumulate gain or merit time credits which, in addition to good time credits, would be applied only in the event of such commutation. (Pet. App. 97a-100a, 102a, 104a, 139a-140a)

In 2005, inmate Bobby Bowden filed a petition in state court alleging that he should be released from prison unconditionally because his life sentence imposed for a murder committed in 1975 was by statute an eighty-year sentence and because the application of good behavior credits to that sentence would have cut it by more than half. The North Carolina Court of Appeals ultimately agreed with

Bowden that the version of N.C. Gen. Stat. § 14-42[4] in effect for offenses committed between April 8, 1974 and June 30, 1978 required that Bowden's "life sentence is considered as an 80-year sentence for all purposes." *State v. Bowden*, 668 S.E.2d 107, 110 (N.C. Ct. App. 2008).[5]

The court in *Bowden* did not resolve the issue of whether Bowden was entitled to immediate unconditional release from prison, nor did it address whether good behavior credits would even apply to the calculation of his unconditional release date. Instead, the court remanded "for a hearing to determine how many sentence reduction credits defendant is eligible to receive and how those credits are to be applied." *Id.*

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[4] The statute provided "Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, in the discretion of the court. A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison." N C. Gen. Stat. § 14-42 (1974).

[5] The North Carolina Supreme Court initially granted review of the decision of the Court of Appeals, but it subsequently found that review had been improvidently granted. *State v. Bowden*, 683 S.E.2d 208 (N.C. 2009)

Initially, officials at DOC were uncertain as to the effect of the decision in *Bowden*. (Pet. App. 115a-120a) While considering the legal implication of the decision, preparations were made in case any inmates were ordered to be released. (Pet. App. 120a-123a)

Ultimately, DOC Secretary Alvin Keller directed – in compliance with the decision in *Bowden* – that unconditional release dates be calculated as eighty years from the date of conviction for all inmates whose crimes were committed between 1974 and 1978 when the earlier version of N.C. Gen. Stat. § 14-42 was in effect. (Pet. App. 103a, 107a-108a) Because the decision in *Bowden* did not address good behavior credits, Secretary Keller further directed that the unconditional release dates for the *Bowden* group not be reduced by use of good behavior credits. (Pet. App. 102a-103a, 135a-136a, 150a-152a) Although Secretary Keller could have exercised the statutory discretion conferred upon him by the state legislature to apply good behavior credits to the unconditional release dates, he declined to do so for inmates in the *Bowden* group because he thought it appropriate that all prisoners with life sentences should be treated similarly in this respect and because he wanted to continue North Carolina's good public policy of releasing prisoners with life sentences only under parole supervision. (Pet. App. 104a, 119a-120a, 123a-125a, 145a-146a, 152a)

2. Application of Good Behavior Credits to Jones.

In 1975, a jury found Jones guilty of first-degree murder in the "cold-blooded killing" of William B. Turner, Sr. (Pet. App. 52a, 66a) He was sentenced to life imprisonment when his original death sentence was vacated, and his life sentence has never been modified or amended by the courts. (Pet. App. 53a, 157a)

Jones's life sentence was imposed for a murder he committed during the time period when N.C. Gen. Stat. § 14-2 provided that "[a] sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years." Recognizing the eighty-year provision of N.C. Gen. Stat. § 14-42 in effect for Jones's crime, DOC utilized good time credits earned by Jones in two ways: to determine his custody classification; and to reduce the twenty years (one-fourth of eighty years) he would have to serve before being eligible for parole. (Pet. App. 158a-159a) Although Jones became eligible for custody promotion in 1982 and parole in 1986 as a result of the application of good time credits, he was not promoted to minimum custody until 1992 and the Parole Board has denied him parole on numerous occasions. (Pet. App. 159a)

In addition to applying good time as described above, DOC gave Jones opportunities to earn other good behavior credits denominated gain and merit

time. Gain and merit time earned by Jones was recorded but never applied in any way. The times were recorded in case Jones succeeded in persuading the Governor to commute his sentence. If so, good, gain, and merit time would be applied to calculate a release date. (Pet. App. 98a, 102a, 156a-158a)

Prior to 2009, no expiration or release date for Jones's life sentence had been calculated by DOC. Instead, agency records showed his release date as "life" or "99/99/99" and time remaining to be served as "99999." (Pet. App. 157a-158a, 161a) Following the decision in *Bowden*, DOC calculated Jones's unconditional release date as February 27, 2055. (Pet. App. 161a)

3. Proceedings Below. On November 18, 2009, Jones filed a petition in Superior Court claiming as follows: (i) his life sentence was the same as a sentence of eighty years because he committed the murder in 1975; (ii) by application of good behavior credits, he had completed service of eighty years even though he had been in prison for less than thirty-five years; and (iii) he was entitled to unconditional release from prison. Following a hearing in Superior Court, the court granted the petition. (Pet. App. 39a-66a)

The North Carolina Supreme Court reversed. (Pet. App. 1a-32a[6]) Three justices joined in a plurality opinion, two other justices filed a concurring opinion, and two justices dissented. (Pet. App. 1a-32a)

After concluding that DOC had the authority under state law to make and interpret its own regulations concerning the application of good behavior credits, the court considered whether Jones had been deprived of his constitutional right to due process as the result of DOC's interpretation that he is not entitled to application of the credits toward his unconditional release date. The court, recognizing that a liberty interest may be created through state regulations, held that Jones "has not been denied credits in which he has a constitutionally protected liberty interest" because he "has received the awards to which he is entitled for the purposes for which he is entitled." *Jones*, 698 S.E.2d at 55-56 (emphasis added). This is so, the court concluded, because as to prisoners with life sentences "[n]o regulation explicitly provides that credits are to be used to calculate an unconditional release date." *Id.* at 57.

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[6] On the same day, the court filed its opinion in *Brown v. N C. Dep't of Corr.*, 697 S E 2d 327 (N.C. 2010). The court reversed the order of the trial court "[f]or the reasons stated in *Jones v. Keller*."

The court also considered Jones's contention that an ex post facto violation had resulted from the failure to unconditionally release him because "DOC's interpretation of its regulations has retroactively increased the punishment for his offense after the offense was committed." *Id.* at 57. Recognizing that legislation retroactively altering sentence reduction credits in effect when a crime was committed can amount to an ex post facto law, the court held there was no ex post facto violation because Jones did "not allege that any legislation or regulation has altered the award of sentence reduction credits" and because DOC had not "changed its interpretation of its applicable regulations." *Id.* at 57.

The court did not reverse the trial court's order as a result of balancing any liberty interest Jones had against public safety. Only *after* finding Jones had no liberty interest at all because no state law required application of good behavior credits to unconditional release did the court even discuss whether any liberty interest would be de minimis.

In his concurring opinion, Justice Newby further explained the court's decision. He first stated that by its legislation in 1974 "the General Assembly never abolished life sentences." *Id.* at 58 (Newby, J., concurring). He further found that because the statutes and regulations governing good behavior credits "make no attempt to set forth the specific

purposes for which time credits are to be applied," DOC's interpretation that the statutes and regulations do not require application of credits to calculate unconditional release dates for life inmates was reasonable and worthy of deference. As a result, he concluded, "life inmates like Jones can claim no liberty interest in having time credits applied to calculate their unconditional release dates." *Id.* at 59.

REASONS WHY THE WRIT SHOULD BE DENIED

No statute or regulation in North Carolina has ever explicitly given prisoners with a life sentence any right to have good behavior credits applied to reduce the date on which the prisoner must be unconditionally released. To the extent that regulations have stated that credits are to be awarded to "all prisoners," those regulations are ambiguous because it is impossible for the credits to be used for the reduction of unconditional release dates for some prisoners. DOC's consistent interpretation of the regulations that good behavior credits are applied in a limited way to prisoners with a life sentence is eminently reasonable.

Without a doubt, life sentences imposed for murder and other serious offenses committed between 1974 and 1978 must be treated as eighty-year sentences for all purposes. But because there has never been a state

law requirement that prisoners with life sentences have their good behavior credits used to reduce unconditional release dates and because DOC has reasonably interpreted its own regulations, the North Carolina Supreme Court correctly held there was no due process or ex post facto violation in this case.

I. JONES'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BECAUSE HE HAD RECEIVED ALL AWARDS TO WHICH HE WAS ENTITLED UNDER STATE LAW.

A. The Decision Below Was In Accordance With This Court's Due Process Jurisprudence.

Jones contends the North Carolina Supreme Court erred by holding that his due process rights were not violated because good time credits reducing his unconditional release dates were "taken away." (Pet. App. 24a) Because no statute or regulation requires application of good behavior credits to reduce the date on which a prisoner with a life sentence must be unconditionally released and because DOC's interpretation of its own regulations is reasonable and lawful, the North Carolina Supreme Court correctly concluded that under state law Jones had received all the credits to which he was due. And because Jones received all the credits to which he was due and

remains lawfully incarcerated, the court did not err by holding that his due process rights were not violated.

"[A] State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures." *Hewitt v. Helms*, 459 U.S. 460, 469 (1983). Although there is no constitutional right to credit for good behavior while in prison, an inmate has a cognizable liberty interest in a shortened prison term resulting from the application of good behavior credits under state law. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

In this case, the North Carolina Supreme Court held that Jones remains lawfully incarcerated because "he has not been denied credits in which he has a constitutionally protected liberty interest." *Jones*, 698 S.E.2d at 56. It correctly based this decision on its conclusion that under state law Jones was not entitled to have his good behavior credits applied to his unconditional release date.

No North Carolina statute has ever required DOC to grant good behavior credits to Jones for any purpose. Except for prisoners who were sentenced under the Fair Sentencing Act – which Jones was not – the state legislature has for the entire time in which Jones has been imprisoned granted absolute discretion to the DOC Secretary to provide for regulations related to good behavior.

Similarly, no North Carolina regulation has ever explicitly required DOC to grant good behavior credits to Jones for the specific purpose of calculating his unconditional release date. It is true that, pursuant to the discretion given its Secretary, DOC has implemented regulations that have made "[a]ll inmate[s], including . . . those with life terms" eligible for good time credits and "[a]ll inmates who perform work" eligible for gain time credits. Absent any plain language showing how those credits should be applied, DOC from the first time those regulations were in effect has interpreted them as applying in a limited way to prisoners with life sentences. Specifically, DOC has always interpreted the regulations as applying to prisoners with life sentences only for the purposes of custody grade and parole eligibility. DOC has never interpreted them as enabling prisoners with life sentences to obtain early release outside the context of parole.

Jones, like other prisoners sentenced for the most serious offenses committed between 1974 and 1978, was sentenced to life imprisonment. Although North Carolina law specified that his sentence be "considered as a sentence for a term of 80 years," DOC has always treated Jones and the other prisoners sentenced to life imprisonment during that period of time the same as all other prisoners with life sentences – *i.e.*, DOC has always interpreted the regulations as applying to them

only for purposes of affecting their custody grade and parole eligibility.

The primary issue in this case is whether, as a state-law matter, DOC has lawfully interpreted its own regulations, taking into account the deference agencies are accorded when construing their own regulations. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (holding that an "agency's interpretation must be given *controlling weight* unless it is plainly erroneous or inconsistent with the regulation") (quotation marks omitted). The answer is yes – even if DOC had mistakenly thought (prior to *Bowden*) that N.C. Gen. Stat. § 14-42 treats Jones's sentence as an eighty-year sentence only for limited purposes. DOC's interpretation of its own regulations is not clearly erroneous nor inconsistent with the regulations themselves.

The regulations at issue here are ambiguous, for they apply on their face to inmates serving *indeterminate* life sentences even though credits could never reduce the amount of time served by them (apart from their impact on parole eligibility). Given that the regulations' language can be read to apply in that particular way to some prisoners with life sentences, their language can likewise be read to apply in that particular way to the 1974-1978 prisoner with life sentences.

To be sure, DOC could have treated the 1974-1978 prisoners the same way it treated other fixed-sentence prisoners; but the plain language did not mandate that route over the one DOC chose. For the *Bowden* group of life prisoners, as noted above, "[n]o regulation explicitly provides that credits are to be used to calculate an unconditional release date." *Jones*, 698 S.E.2d at 57.

Even though DOC Secretaries interpreted N.C. Gen. Stat. § 14-2 for more than thirty years in a way now found to be incorrect, the fact remains that no Secretary has ever exercised the absolute discretion given to him by statute to grant credits toward unconditional release to inmates with life sentences, including those sentenced from crimes committed between 1974 and 1978. And the DOC Secretary has declined to do so now.

It is true that some of the amendments made to DOC rules long after Jones committed murder and was sentenced for that murder provide that good behavior credits are sentence reduction credits "applied to an inmate's sentence that reduce the amount of time to be served." Those versions of the rules nevertheless do not provide that the credits must be applied to life sentences.[7]

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[7] The only mention of "unconditional release" in DOC's regulations and rules appears in the 2007 version of

Because DOC's interpretation of its own ambiguous regulations was a reasonable and lawful interpretation, the North Carolina Supreme Court correctly held, as a state-law matter, that Jones "has no State-created right to have his time credits used to calculate his eligibility for unconditional release." *Id.* at 56. The court's holding that Jones has not been denied his due process rights inevitably follows. His sentence has not expired on account of good behavior credits, and it therefore does not violate due process to continue his incarceration.

Only *after* the North Carolina Supreme Court correctly held that Jones had no liberty interest in the application of good behavior credits to an unconditional release date did the court address whether a liberty interest, "if any," would be de minimis in comparison to the State's interest. *Jones*, 698 S.E.2d at 56. It was while discussing this

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DOC's rule. The rule provides that "[f]or inmates sentenced under the Fair Sentencing Act, Good Time reduces the time required to be served for unconditional release from prison." State of North Carolina Department of Correction, Division of Prisons, Policy and Procedure § 0110 (2007). (Pet. App. 200a) Jones was not sentenced under the Fair Sentencing Act. But even for prisoners sentenced under the Fair Sentencing Act, it would be impossible for good time credits to be applied to an inmate's sentence of life imprisonment for the purpose of reducing time to be served

balancing that the court reiterated that Jones had "no State-created right to have his time credits used to calculate his eligibility for unconditional release." *Id.* at 56. The concurring justices further made clear that the basis for the decision of the court was not the balancing of interests when they stated that "the relevant statutes and regulations do not give inmates sentenced to life imprisonment" the right to have good behavior credits applied to their unconditional release dates and that DOC has never "vested life inmates with such a right through its manner of administering those statutes and regulations." *Id.* at 59 (Newby, J., concurring). As a result, they found, "life inmates like Jones can claim no liberty interest in having time credits applied to calculate their unconditional release date." *Id.* Where the Court correctly found, based on state law, that no statute or regulation required application of good behavior credits to the calculation of Jones's unconditional release date, a finding that any liberty interest was de minimis is of no consequence.

B. The Decision Below Was In Accordance With This Court's Ex Post Facto Jurisprudence.

Jones also contends the North Carolina Supreme Court erred by holding there was no ex post facto violation because DOC's interpretation of its regulations has "inflict[ed] a greater punishment, than

the law annexed to the crime, when committed." *Collins v. Youngblood*, 497 U.S. 37, 42, (1990). Because the North Carolina Supreme Court correctly concluded that under state law petitioners had never been awarded and had never earned credits toward unconditional release, it also correctly held there was no ex post facto violation in this case.

In *Lynce v. Mathis*, 519 U.S. 433 (1997), this Court considered whether a Florida statute cancelling early release credits for certain classes of offenders after those credits had been awarded – indeed, even after the inmates were released from custody – resulted in an ex post facto violation. This Court held that the statute unconstitutionally disadvantaged the prisoner "because it resulted in his rearrest and prolonged his imprisonment." *Id.* at 446-47.

This case is distinguishable from *Lynce*. In *Lynce*, the Florida legislature enacted a law providing for early release credits, the credits in fact were awarded to the prisoner, and he was released. The Florida legislature actually enacted a law cancelling credits already received by certain classes of offenders. By contrast, in the present case no statute or regulation requires prisoners such as Jones to receive good behavior credits toward unconditional release. Such credits never have been awarded to petitioners, who have not been released, and the North Carolina

General Assembly has not enacted any law cancelling credits already received by petitioners.

The North Carolina Supreme Court did not err in its conclusion that there was no ex post facto violation because DOC has not taken away from petitioners anything already awarded or earned. The undisputed facts show that DOC, pursuant to its discretionary authority, has never awarded credits toward an unconditional release date to prisoners with life sentences. Nor has DOC changed its longstanding interpretation of its regulations. Finally, DOC's interpretation of its regulations is reasonable and lawful in light of the fact that none of the regulations requires application of credits toward unconditional release of life prisoners.

II. THE DECISION OF THE NORTH CAROLINA SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS.

Jones contends the North Carolina Supreme Court's decision is in conflict with decisions of other courts. Specifically, he argues that "North Carolina is now a dramatic outlier on the question of whether States must honor sentence-reduction credits earned and awarded under previously established regimes." (Pet. App. 29a-30a) Not so. All of the conflicts alleged by Jones are based on his mistaken premise that DOC officials violated the Due Process and *Ex Post Facto*

Clauses by depriving him of credits to which he was entitled under state law. Because, as shown in Section I, *supra*, they did not, the purported conflicts evaporate.

As noted above, the North Carolina Supreme Court held that petitioners' constitutional due process rights were not violated "[b]ecause Jones has received the awards to which he is entitled." *Jones*, 698 S.E.2d at 56. Only *after* concluding that under state law no liberty interest had been created because petitioners had not been awarded and had not earned good time credits toward their unconditional release dates did the court address whether any liberty interest would be de minimis.

In most of the cases cited by petitioners in support of their contention that the decision of the North Carolina Supreme Court is an outlier, the courts found prisoners were deprived of liberty interests when credits previously awarded were rescinded or when laws were amended in such a way that credits could no longer be earned. *See, e.g.*, *Teague v. Quarterman*, 482 F.3d 769, 778-80 (5th Cir. 2007) (rejecting concept of de minimis due process violation where inmate was "deprived of previously earned good-time credits"); *Raske v. Martinez*, 876 F.2d 1496, 1502 (11th Cir.) (finding there is no doctrine of "constitutional mistake" that would justify the application of a modified statute to limit gain time provided to a prisoner by an earlier

version of the statute), *cert. denied*, 493 U.S. 993 (1989); *Secretary v. Demby*, 890 A.2d 310, 331 (Md. 2006) (finding an ex post facto violation where credits had not been revoked but an amendment to a law had "curtailed the availability of future credits"). In this case, as the North Carolina Supreme Court found, no credits were rescinded or earned and no regulations have been changed in such a way as to deprive petitioners from any entitlement to credits toward unconditional release.

Similarly, in *Smith v. Scott*, 223 F.3d 1191 (10th Cir. 2000), a prisoner had credits deducted after being informed that he had been mistakenly awarded them. The court held there was an ex post facto violation resulting from the deduction of the credits where a 1997 amendment to a rule was a substantive change that was not foreseeable in 1992. In so holding, the court noted that although an agency's interpretation of its own rules was entitled to due deference, "[a]n agency's statement that an amendment is nothing more than a clarification cannot be accepted as conclusive because such a result would enable the [agency] to make substantive changes in the guise of clarification." *Id.* at 1195 (quotation marks omitted).

In this case, unlike in *Smith*, petitioners were never awarded and never earned any credits that have now been taken away. As argued above, DOC's interpretation of its own regulations is reasonable and

lawful where those regulations are ambiguous and where none of the regulations has ever explicitly provided for the application of credits to unconditional release.

Petitioners have failed to show that the decision of the North Carolina Supreme Court conflicts with decisions of other courts. Unlike other decisions cited by petitioners, the decision here did not involve any retroactive rescission of credits or any modification or reinterpretation of a regulation to the detriment of petitioners because no state law ever required application of good behavior credits for the purpose of shortening a life prisoner's time before unconditional release.

III. THE ISSUES RAISED ARE NOT OF NATIONWIDE IMPORTANCE.

Although Jones contends the North Carolina Supreme Court has misinterpreted and misapplied this Court's decisions, he in essence is attacking the court's determination that under state law he was not entitled to the application of his good behavior credits to calculate an unconditional release date. As demonstrated above, the court correctly held that no state law required application of credits in such a way. That decision is not one of nationwide importance for which this Court should grant review.

Jones was sentenced to life imprisonment after his death sentence for a cold-blooded murder was vacated. He has had and should continue to have opportunities to be paroled. His assertion that he should be released with no conditions less than halfway through the eighty years he is required by state statute to serve is nothing more than an attack on North Carolina law. The North Carolina Supreme Court, the ultimate authority on North Carolina law, correctly held that no statute or regulation in North Carolina required application of Jones's good behavior credits to his unconditional release date and that DOC's interpretation of its own regulations was lawful. There is no reason for this Court to review that decision.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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March 2011

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No. 10-804 (4)

Supreme Court, U.S.
FILED
MAR 29 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ALFORD JONES,

Petitioner,

v.

ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND MICHAEL CALLAHAN, ADMINISTRATOR OF RUTHERFORD CORRECTION CENTER,

Respondents.

FAYE BROWN,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND KENNETH ROYSTER, SUPERINTENDENT OF RALEIGH CORRECTIONAL CENTER FOR WOMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In this case, the North Carolina Supreme Court held that the federal Due Process and Ex Post Facto Clauses permitted the Department of Correction to refuse to reduce Alford Jones's sentence, notwithstanding the sentence-reduction credits DOC had concededly awarded him. That holding is one of *federal* law; it cannot be squared with this Court's precedent or with the decisions of other appellate courts; and its immediate consequence is that many North Carolina inmates who have been imprisoned since the 1970s will be forced to serve an additional 40 or 50 years after their legal sentences have expired. This is an extraordinary case, and this Court should grant review.

Nothing in the State's opposition casts doubt on that conclusion. Indeed, the State makes *no attempt at all* to defend the North Carolina court's federal constitutional analysis—recognizing, perhaps, that it is indefensible. Instead, the State seeks to recast the court's decision as nothing more than the acceptance, as a matter of "state law," of a state agency's "interpretation" of its "ambiguous" regulations. Opp. 12-13, 16.[1]

That effort fails. While the North Carolina court did purport to "defer" to DOC's "interpretation," it did not do so because it found the regulations "ambiguous." Rather, the court's "deference" to DOC's creation of a *post hoc* exception to its regulations was part and parcel of the court's analysis of the federal question. Pet. App. 9a-14a. Indeed, the court's decision that DOC's belatedly asserted "interpretation" of its regulations

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[1] The State does not contend that this Court lacks jurisdiction. Nor could it. The federal constitutional questions presented were properly raised and passed on below, and this Court has jurisdiction under 28 U.S.C. §1257(a).

was constitutionally permissible rested squarely on the court's balancing of what it called the inmates' "de minimis" liberty interest in sentence-reduction credits (Pet. App. 11a) against "the State's compelling interest in keeping inmates incarcerated until they can be released with safety" (*id.*; *see also* Pet. App. 13a). That analysis, if followed, would eviscerate the federal constitutional safeguards against arbitrary and retroactive deprivations of state-created rights.

Even if the State had accurately characterized the North Carolina court's analysis, the court's decision would not be immune from review simply because the federal question concerns an entitlement created by state law. To be sure, state courts are the final arbiters of state-law issues that arise independently of federal rights. But where, as here, the question is whether the State has unconstitutionally abrogated a pre-existing state-law entitlement, this Court need not defer to the state court regarding the contours of that pre-existing right. Doing so could prevent the Court from redressing an obvious constitutional violation. *See, e.g.*, *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938) ("[I]n order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a [commitment] was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation."). That would be precisely the result here.

In short, this case presents a federal constitutional question of great import and great practical consequence. As the dissent observed, it was "a hard case" for the North Carolina court because it had "excited" a great deal of "[p]ublic attention." Pet. App. 31a-32a. The Governor had called the inmates' release "unacceptable" and implied that she would go to prison her-

self rather than see them freed. EJI et al., Amicus Br. 11. Quoting Justice Holmes, the dissent noted that such circumstances "exercise a kind of hydraulic pressure which makes what was previously clear seem doubtful, and before which even well settled principles of law will bend." Pet. App. 32a. Indeed, the state court's decision unquestionably bent well-settled principles by permitting the State to create an after-the-fact exception for a controversial group of prisoners, denying them the benefit of the sentence-reduction credits they had already earned. "Many would argue" that the court's decision not only bent the law, but reached "the breaking point." *Id.* It thus demands this Court's review.

I. THE NORTH CAROLINA SUPREME COURT WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW

Abandoning the North Carolina Supreme Court's federal constitutional analysis, the State makes only one argument against review of the decision below. Its view is that the state court correctly determined that Jones had no state-law right to have his credits used to reduce his sentence because DOC's regulations are "ambiguous" (Opp. 16), and that this predicate finding renders the constitutional analysis "of no consequence" (Opp. 19).

This argument mischaracterizes the court's reasoning and its holding. Had the court based its decision solely on the conclusion that DOC never granted Jones any credits that could reduce his sentence, it would have had no need to decide whether Jones received due process. But the court did decide that question, and its decision to "defer" to DOC's newly articulated "interpretation" of its regulations was inextricably bound up

with its misapprehension of what this Court's precedent requires. Indeed, contrary to the State's contentions, the court's holding flowed directly from its impermissible balancing analysis. *See* Pet. App. 13a (holding that, "[i]n light of the compelling State interest in maintaining public safety, ... DOC [need not] apply time credits for purposes of unconditional release to those who committed first-degree murder ... and were sentenced [under the 80-year provision]").

In reality, this case involves no genuine state-law question at all. The state court acknowledged all the state-law principles, and all the facts, necessary to demonstrate a violation of the Due Process and Ex Post Facto Clauses: (1) Until 2009, DOC wrongly "interpreted a life sentence imposed under [the 80-year provision] to be an indeterminate sentence that would expire only upon an inmate's death." Pet. App. 4a. (2) In fact, the "statute unambiguously defined Jones's sentence as a determinate term of imprisonment for eighty years." *Id.* (3) "DOC's regulations provide for good time, gain time, and merit time to be credited against an inmate's sentence." Pet. App. 6a. (4) DOC has always used those credits to reduce the sentences of prisoners serving determinate terms of imprisonment. Pet. App. 6a-7a. (5) "Jones had accrued" credits sufficient to mandate his release if "credited against [his] sentence." Pet. App. 2a, 6a-7a (citing regulations). The only holding consistent with the federal Constitution that can follow from these facts and legal principles is that DOC was required to release Jones.

The court avoided that conclusion by reasoning that, because DOC had "never used good time, gain time, or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment," and because, when Jones was

sentenced, DOC did not calculate a release date for him (Pet. App. 7a), the court could "defer" to DOC's "interpretation" that "it awarded Jones good time solely for the purposes of [determining] custody grade and ... [a] parole eligibility date, and not for the purpose of allowing Jones unconditional release" (Pet. App. 7a-8a).

As the dissent noted, however, DOC's position was not an "interpretation of its regulations" at all. App. 29a. DOC did not calculate a release date for Jones when he was sentenced because it mistakenly believed he was serving an indeterminate life sentence. And DOC did not apply sentence-reduction credits to determine unconditional release dates for inmates with indeterminate life sentences because doing so is logically impossible: Such sentences have no release date against which sentence-reduction credits can be applied. DOC's belief that Jones's credits would not reduce his sentence was simply part of its mistaken belief that he had been sentenced to natural life. In short, as the court elsewhere recognized (Pet. App. 4a), DOC's position was based on an incorrect interpretation of an "unambiguous" statute, not a "reasonable" interpretation of an "ambiguous regulation[]" (Opp. 18).

Put simply, this case does not present the question the State claims it presents: namely, whether DOC's position is a "reasonable" interpretation of the "ambiguous" regulations that existed when Jones was sentenced. Although DOC could presumably have announced, *before* awarding the credits at issue, that it interpreted its regulations to mean that inmates with 80-year "life" sentences could not use their credits to reduce their sentences, that is not what happened. It is undisputed that DOC did not articulate its current "interpretation" of its regulations until 2009, after *State* v. *Bowden*, 668 S.E.2d 107 (N.C. Ct. App. 2008), held that

inmates like Jones were serving determinate 80-year sentences for all purposes. Only after *Bowden* compelled DOC to correct its mistake did DOC decide that Jones's sentence-reduction credits were special, and would not have their ordinary, sentence-reducing effect.

The North Carolina court's "deference" to that *ex post* "interpretation" of Jones's pre-existing entitlement cannot permit its decision to evade this Court's review. Indeed, the *ex post* abrogation of such entitlements is precisely what the federal Constitution forbids. According "deference" to an agency's present interpretation of a pre-existing entitlement defeats that constitutional protection by "enabl[ing] the agency to make substantive changes in the guise of clarification." *Smith* v. *Scott*, 223 F.3d 1191, 1195 (10th Cir. 2000). Whether DOC's present interpretation comports with pre-existing law is thus "a federal question [courts must] determine for [them]selves." *Id.*

And that question is easily answered. The State has not identified a single inmate in North Carolina history who served a definite term of years but was denied the use of his sentence-reduction credits for the purpose of sentence reduction. Indeed, the State concedes that all prisoners except those serving "life sentences" receive credits "to calculate unconditional release dates." Opp. 3. That comports with DOC regulations defining good-time, gain-time, and merit-time credits as "credits applied to an inmate's sentence that reduce the amount of time to be served." Pet. App. 192a. And it is consistent with the plain meaning of "good time," "merit time," and other "time" credits: The inmate earns time off his sentence.

The State attempts to obscure the novelty of its contrary "interpretation" by suggesting (at, *e.g.*, Opp. 17) that those sentenced under the 80-year provision are still serving "life" sentences and that DOC never exercised its discretion "to grant credits toward unconditional release to inmates with life sentences." This wordplay is unavailing. As the State concedes, the relevant inmates are serving determinate 80-year sentences "for all purposes" (Opp. 12), and for inmates serving determinate sentences, DOC "use[s] the credits to calculate unconditional release dates" (Opp. 3). That the State continues to call Jones's 80-year sentence a "life" sentence only demonstrates the State's ongoing quarrel with the statute's unambiguous text—and DOC's fundamental departure from the longstanding practice it purports to interpret.

Lacking the ability to tie its present "interpretation" to any regulatory text or existing practice, the State in effect argues that—notwithstanding that DOC *did* award Jones sentence-reduction credits—Jones should not be able to use his credits because DOC would not have wanted to award them had it realized that Jones had a determinate sentence. But "[t]he federal courts" enforcing the Due Process and Ex Post Facto Clauses "recognize no doctrine of 'constitutional mistake.'" *Raske* v. *Martinez*, 876 F.2d 1496, 1502 (11th Cir. 1989). Thus, DOC's mistaken belief that Jones would never benefit from his sentence-reduction credits "by no means prevented [sentence-reduction rights] from vesting." *Id.* Indeed, the essence of the federal constitutional right is that state actors may not void pre-existing entitlements *even if* having granted those entitlements later proves mistaken or improvident.

But the concern that DOC had mistakenly granted Jones sentence-reduction credits—and the notion that,

under the circumstances, Jones's liberty interest in those credits was outweighed by the interest in keeping those convicted of first-degree murder incarcerated—was precisely what underlay the North Carolina court's holding. The court reasoned that, under this Court's precedent, "Jones's liberty interest in good time, gain time, and merit time is limited," and that "his liberty interest, if any, in having these credits used [to] calculat[e] his date of unconditional release is de minimis, particularly when contrasted with the State's compelling interest in keeping inmates incarcerated until they can be released with safety." Pet. App. 11a. The court acknowledged that DOC's regulations provided that good-time, gain-time and merit-time credits "reduce[] the amount of time to be served." Pet. App. 13a. But it reasoned that, because DOC mistakenly believed Jones had a natural life sentence, DOC "never considered that [its] regulations applied to Jones," and so it "did not fully prepare Jones for unconditional release." *Id.* The court thus held that, "[i]n light of the compelling State interest in maintaining public safety," DOC was not required to "apply time credits for purposes of unconditional release to those who committed first-degree murder" and were sentenced under the 80-year provision. *Id.*[2]

As explained in the petition for certiorari, this reasoning cannot be sustained. There is no support in this Court's cases or elsewhere for the notion that an interest in freedom from incarceration can ever be "de minimis." Nor is there any support for the notion that

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[2] If the court's holding were *not* premised on a balancing analysis, it could not logically have limited its holding to those convicted of first-degree murder, as to whom the "State['s] interest in ensuring public safety is particularly pronounced." Pet. App. 12a.

an inmate may be denied the benefit of sentence-reduction credits without any legal process because the "the State's compelling interest in keeping inmates incarcerated until they can be released with safety" outweighs those inmates' liberty interest in their credits. While safety is an important and laudable goal, generalized safety concerns have never been an adequate basis for a deprivation of liberty without any process or for a retroactive increase in punishment.[3] Indeed, the State neither disputes the petition's arguments on that score nor defends the lower court's reasoning. Because that reasoning, and its result, contravene basic constitutional principles, this Court should grant review.

II. This Court Is The "Ultimate Authority" On Whether State Actors Violate The Federal Constitution By Impairing Existing Entitlements

Contrary to the State's contentions, the North Carolina court's decision to "defer" to DOC's newly announced "interpretation" of its regulations in light of DOC's mistake regarding Jones's sentence and its interest in keeping inmates incarcerated is a decision of federal law—and a profoundly misguided one. But even if one were to accept the State's characterization of the North Carolina court's decision, this Court should still grant review.

This Court routinely reviews state-court decisions to ensure that preexisting state-law entitlements have not been impaired or ignored in derogation of federal

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[3] The State has never claimed that Jones or Brown poses any safety risk, and both have participated in community and work release without incident. Pet. App. 124a-126a, 153a-154a.

constitutional rights, both in cases implicating liberty interests protected by the Due Process and Ex Post Facto Clauses, *see, e.g.*, *Rogers* v. *Tennessee*, 532 U.S. 451 (2001); *Weaver* v. *Graham*, 450 U.S. 24 (1981); *Douglas* v. *Buder*, 412 U.S. 430 (1973); *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and in other contexts in which the Constitution protects pre-existing state-law entitlements, *see, e.g.*, *Brand*, 303 U.S. 95 (Contract Clause); *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010) (Takings Clause); *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. 603 (1812); *Smith* v. *Maryland*, 10 U.S. 286 (1810) (federal treaties).

That review necessarily encompasses the question whether a constitutionally protected state-law entitlement exists in the first instance, and if so, what that entitlement requires. If the Court did not exercise independent judgment in that respect, "the constitutional mandate [could] become a dead letter." *Brand*, 303 U.S. at 100; *see* Wechsler, *The Appellate Jurisdiction of the Supreme Court*, 34 Wash. & Lee L. Rev. 1043, 1052 (1977) ("[W]here ... the existence or the application of a federal right turns on a logically antecedent finding on a matter of state law, it is essential ... [that the Court] consider the state question. Federal rights could otherwise be nullified by the manipulation of state law."); Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1925-1926 (2003).

The deference this Court will extend to state courts on such questions is, accordingly, limited: "[W]e accord respectful consideration and great weight to the views of the state's highest court but ... we are bound to decide for ourselves whether a[n obligation] was [created], what are its terms and conditions, and whether

the State has, by later legislation, impaired its obligation." *Brand*, 303 U.S. at 100. As the Court reiterated last Term, "[w]e do not defer to ... state judges in determining whether, for example, a state-court decision has deprived a defendant of due process." *Stop the Beach Renourishment*, 130 S. Ct. at 2608 n.9 (plurality); *see Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756-757 (2005) ("despite its state-law underpinnings, [the existence of a protected entitlement] is ultimately [a question] of federal constitutional law").

In the end, the State's argument that the North Carolina court is the "ultimate authority" (Opp. 25) on the question whether Jones had a pre-existing right to sentence-reduction credits must fail because federal constitutional law renders the court's analysis and holding indefensible. For over thirty years, DOC mistakenly believed Jones had an indeterminate life sentence that could not be reduced. Only when DOC was forced by the courts to correct Jones's sentence did it seek to recharacterize the sentence-reduction credits Jones had already earned so they could not effect any sentence reduction. The Constitution forbids such a *post hoc* reinterpretation of an accrued liberty interest. And the state court's decision to "defer" to DOC's "interpretation" leaves Jones's constitutional rights at the mercy of the very party those rights are intended to restrain. It is abundantly clear that this Court need not let stand a decision of "state law" whose outcome is the circumvention of federal constitutional protections. It should not accept the State's invitation to do so here and thereby leave unlawfully incarcerated a substantial number of inmates who have already earned their freedom.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2011

No. 10-804

Supreme Court, U.S.
FILED
JAN 18 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ALFORD JONES,

Petitioner,

v.

ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND MICHAEL CALLAHAN, ADMINISTRATOR OF RUTHERFORD CORRECTION CENTER,

Respondents.

FAYE BROWN,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND KENNETH ROYSTER, SUPERINTENDENT OF RALEIGH CORRECTIONAL CENTER FOR WOMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR *AMICI CURIAE* EQUAL JUSTICE INITIATIVE, THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, NORTH CAROLINA ADVOCATES FOR JUSTICE, PRISON LAW OFFICE, AND THE SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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LIST OF *AMICI CURIAE*[1]

Equal Justice Initiative ("EJI")

The Legal Aid Society of the City of New York ("LASCNY")

North Carolina Advocates for Justice ("NCAJ")

Prison Law Office ("PLO")

The Southern Center for Human Rights ("SCHR")

INTEREST OF THE *AMICI CURIAE*

Amici are private, nonprofit legal advocacy organizations that, collectively, represent criminal defendants and/or prisoners in multiple states, and share a common interest in ensuring that criminal sentences are administered in accordance with prisoners' constitutional, statutory and other legal rights. EJI provides legal representation to indigent defendants and prisoners seeking relief for denial of fair and just treatment in the legal system, and also prepares reports, newsletters and manuals to assist advocates and policymakers in the critically important work of reforming the administration of criminal justice. LASCNY has provided free legal assistance to indigent persons in New York City since 1876. LASCNY's Criminal Defense Practice is the largest indigent defender service and, through its Criminal Appeals Bureau, the largest criminal appel-

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[1] The parties have consented to the filing of this brief under Supreme Court Rule 37.2, and their letters of consent have been lodged with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

late practitioner in New York State, engaging in state post-conviction and federal habeas corpus practice in addition to direct appeals in the state courts. NCAJ is a volunteer professional organization of nearly 4,000 North Carolina lawyers devoted primarily to advocating and protecting the rights of the injured in civil litigation and the accused in criminal cases and ensuring the integrity of the judicial system. PLO provides free legal services to California state prisoners, engages in public advocacy regarding prison conditions, and provides technical assistance to attorneys nationwide. SCHR provides legal representation to people facing the death penalty, challenges human rights violations in prisons and jails, seeks through litigation and advocacy to improve legal representation for poor people accused of crimes, and advocates for criminal justice system reforms on behalf of those affected by the system in the Southern United States. *Amici* have each previously appeared in this Court in numerous cases as *amicus curiae*.

SUMMARY OF ARGUMENT[2]

The Court should grant certiorari for three reasons.

First, as elaborated in section I below and in the petition for certiorari, the decisions below conflict with the Due Process and Ex Post Facto precedents of this Court and other appellate courts. Those precedents make clear that while states are not obliged to offer prisoners sentence-reduction credits for "good time" and "good behavior," states must honor any such cred-

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[2] In addition to the points set forth herein, *amici* adopt the statement of facts and arguments made in the petition for certiorari.

its that their laws have allowed prisoners to accrue. The decisions below permit North Carolina to violate those constitutional requirements.

Second, as elaborated in section II below, the decisions below raise fundamental questions about the protections afforded by the Due Process and Ex Post Facto Clauses and the rule of law. The North Carolina Supreme Court rightly ruled that the legal basis upon which the State had refused to apply petitioners' sentence reduction credits to reduce their sentences was "unambiguously" wrong. But, after the Governor of North Carolina strongly criticized the court and threatened to defy court orders, the court "defer[red]" to a new rationalization of the State's position which the State had not previously articulated and which neither the State nor the court attempted to relate to the text of the applicable statute and regulations. Moreover, in doing so, the court relied on reasoning that, if followed as precedent, would enable states easily and routinely to evade their constitutional obligation to honor the rights they have created, as North Carolina is doing.

Third, as elaborated in section III below, much like the federal sentence-reduction credit decision the Court examined last term in *Barber v. Thomas*, 506 U.S. ___, 130 S. Ct. 2499, 2504 (2010), the decisions below merit review because of the scope and importance of the liberty interests at stake. If allowed to stand, the decisions below would delay the unconditional release of approximately 136 prisoners for long periods—in many cases, including petitioners', for over 40 years. Doing so would violate those prisoners' constitutional rights and also undermine confidence in the integrity of widely used sentence-reduction credit programs, imperiling their benefits to prison morale, prison discipline and rehabilitation.

ARGUMENT

I. THE DECISIONS BELOW CONFLICT WITH PRECEDENTS OF THIS AND OTHER APPELLATE COURTS

The legal crux of this case is simple. It is undisputed that (1) under applicable North Carolina Department of Correction ("DOC") regulations, petitioners earned "sentence-reduction credits" for good conduct and productive work; (2) if petitioners' accrued sentence-reduction credits apply to reduce their sentences, they have fully served those sentences and were entitled to be released, without qualification, some time ago, Pet. App. 2a, 6a-7a; and (3) all prisoners serving a determinate term-of-years sentence in North Carolina are entitled to have their sentence-reduction credits applied to accelerate their unconditional release dates, *see* Pet. 21-22.

In its efforts to prevent the release of petitioners and similarly situated prisoners, the State first argued that they were not serving determinate term-of-years sentences. However, the statute governing their sentences expressly provides that, although they are nominally labeled life sentences, petitioners' sentences shall be treated as 80-year determinate term sentences. N.C. Gen. Stat. § 14-2 (1974). The North Carolina courts have thus authoritatively rejected the State's contrary arguments. *See State v. Bowden*, 668 S.E.2d 107, 109-10 (N.C. Ct. App. 2008) (a sentence governed by § 14-2 is "for all purposes" an 80-year determinate sentence), *review dismissed as improvidently granted*, 683 S.E.2d 208 (N.C. 2009); Pet. App. 4a ("this statute unambiguously defined Jones's sentence as a determinate term of imprisonment for eighty years").

In the decision below, however, the North Carolina Supreme Court then "defer[red]" to the State's position

that because petitioners' sentences were labeled "life"—even though they are determinate term-of-years sentences "for all purposes"—petitioners' sentence-reduction credits cannot be used to reduce their sentences. Pet. App. 8a. As a result, despite petitioners' earning many years of credit for good time, good work and educational achievements, which, if applied to reduce their sentences, would entitle petitioners to be released now, North Carolina has refused to release them (other than, potentially, based on a future exercise of parole discretion) until their 80-year terms expire in 2055.

The North Carolina Supreme Court upheld that position even though it recognized that "DOC's regulations provide for good time, gain time, and merit time to be credited against an inmate's sentence," Pet. App. 6a, and even though neither the State nor the court cited anything in the text or history of the applicable statutes and regulations that supports the State's position. Current regulations confirm that in North Carolina, "sentence-reduction credits" are what they appear to be: credits that apply to "reduce[] the amount of time to be served." DOC, Division of Prisons, Policy & Procedure, ch. B, § 0110(f) (2007). Nor have the regulations ever excluded prisoners with 80-year "life" sentences from receiving sentence-reduction credits or from the application of those credits to reduce sentences. Indeed, the original regulations expressly provided that sentence-reduction credits are available to "[a]ll inmates, including ... those with life terms." 5 N.C. Admin. Code 2B.0101 (1976).[3]

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[3] Despite that provision, North Carolina has had a consistent practice, albeit one not announced in regulations, of not applying

The State, and the North Carolina Supreme Court, have simply failed to apply the law as written. That failure violates both the Due Process Clause and the Ex Post Facto Clause under this Court's precedent. Since there is no federal constitutional right to sentence-reduction credits, North Carolina could have prevented petitioners' release in various ways—by providing in the 1974 legislation governing petitioners' sentences that sentence-reduction credits (which had been in general use in North Carolina since at least 1955) could not be used to reduce them; by making those sentences indeterminate;[4] or by stating an exception in its sentence-reduction credit regulations. But instead, North Carolina enacted and maintained unambiguous statutory and regulatory provisions indicating that if prisoners such as petitioners met the behavioral, work and educational criteria set by the State, they would earn a right

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sentence-reduction credits to determine unconditional release dates for prisoners serving *indeterminate* life sentences. That practice has a logical basis: in mathematical terms, an indeterminate life sentence is infinite from the prisoner's standpoint, and infinity minus, say, 20 years of sentence-reduction credits is still infinity. *See, e.g., Parker v. Percy*, 314 N.W.2d 166, 168 (Wis. Ct. App. 1981) (under Wisconsin law, "lifers have no right to credit against their sentences for good time or industrial good time. A life sentence has no date or maximum period from which it is possible to deduct credits for good time or industrial good time."). But that logic does not extend to petitioners' 80-year sentences. The State can calculate—and has calculated—precise release dates based on the application of the sentence-reduction credits petitioners have earned to reduce the 80-year term.

[4] In *Hendrix v. Duckworth*, 442 N.E.2d 1058, 1059-60 (Ind. 1983), for example, the Indiana Supreme Court held that prisoners serving sentences that were both indeterminate and expressly excluded from reduction by sentence-reduction credits by legislation had no constitutional right to have their sentences reduced.

to early release. Having done so, North Carolina is required by the Due Process and Ex Post Facto Clauses to honor sentence-reduction credits earned under existing law. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539 (1974); *Lynce v. Mathis*, 519 U.S. 443 (1997); *Weaver v. Graham*, 450 U.S. 24 (1981). The North Carolina Supreme Court's contrary decision conflicts with both this Court's precedent and the precedents of other appellate courts. *See, e.g., Sec'y, Dep't of Public Safety & Correctional Serv. v. Demby*, 890 A.2d 310 (Md. 2006); *Johnson v. State*, 472 A.2d 1311, 1312-15 (Del. 1983).

II. The Decisions Below Raise Fundamental Questions About The Protections Afforded By The Due Process And Ex Post Facto Clauses And The Rule Of Law

The political climate, the identity of political actors, and other circumstances change over time. Since the 1970s, when petitioners were sentenced, sentencing has been a particularly volatile area, with substantial movement in North Carolina (and elsewhere) towards mandatory minimum sentencing and in favor of "truth-in-sentencing" and "structured sentencing" reforms that limit the availability of sentence reductions. *See, e.g.*, N.C. Gen. Stat. §§ 15A-1340.1 *et seq.* (1981) (repealed); 1979 N.C. Session Laws, ch. 760, § 2 (North Carolina's 1981 Fair Sentencing Act); N.C. Gen. Stat. § 148-13(c)(d) (1981) (repealed) (the first North Carolina legislation to exclude (prospectively only) certain classes of inmates from eligibility for sentence-reduction credits); N.C. Gen. Stat. §§ 15A-1340.10 *et seq.*; 1993 N.C. Session Laws, ch. 538, § 1 (North Carolina's Structured Sentencing Act); DOC, Division of Prisons Policy and Procedure, ch. B, §§ 0111(d), 0112(c)

(1994) (prospectively restricting availability of sentence reduction credits).

In such circumstances, our Constitution generally allows state legislatures and, with respect to regulations, state executives to change the law going forward —as North Carolina did in its 1981 and 1994 reforms, each of which addresses future sentences only. *See, e.g., State v. Ahearn*, 300 S.E.2d 689 (N.C. 1983) (Fair Sentencing Act was not retroactive). But the rule of law requires, and the Due Process and Ex Post Facto Clauses mandate, that the laws already on the books be applied to determine the adverse consequences of pre-amendment conduct, and the courts are charged with enforcing those guarantees.

These principles were compromised in the decisions below. Confronted with an authoritative ruling in *Bowden* that the 1974 statute governing petitioners' sentences provided for determinate sentences, not indeterminate life sentences, North Carolina officials in 2009 resolved to keep petitioners and over 100 similarly situated prisoners incarcerated as if the 1974 statute had provided for life imprisonment. After State officials harshly criticized the courts for the ruling on the 1974 statute, the North Carolina Supreme Court then "defer[red]" (Pet. App. 8a) to the State's position, based on reasoning that has no basis in the text of any applicable state statute or regulation, and that would deprive the Due Process and Ex Post Facto Clauses of much of their force.

The State claims that it had interpreted N.C. Gen. Stat. 14-2 (1974), the provision governing petitioners' sentences, as providing for an indeterminate life sentence, *see* Pet. App. 4a—although the State has never published that alleged interpretation in a regulation

and had never otherwise publicly stated that position until the mid-2000s. In *Bowden*, and in the decision below, the North Carolina courts held, to the contrary, that the statute "unambiguously" (Pet. App. 4a) and "for all purposes" (*Bowden*, 668 S.E.2d at 109) provides for an 80-year determinate sentence.

Both during and immediately after the *Bowden* case, State officials clearly understood, and clearly communicated to the courts and the public, what was at stake. Because North Carolina has consistently allowed prisoners serving determinate sentences to accelerate their unqualified release dates by earning sentence-reduction credits, the construction—now adopted by the North Carolina Supreme Court—of N.C. Gen. Stat. 14-2 (1974) as providing for a determinate term of years would mean that, having earned many years of sentence-reduction credits, petitioners would be entitled to be released now. The State demonstrated that understanding in several ways.

First, the State unsuccessfully opposed Bowden's claim that N.C. Gen. Stat. § 14-2 provides for a determinate sentence on the basis that granting that claim would mean early unconditional release for prisoners sentenced under § 14-2. In petitioning the North Carolina Supreme Court for discretionary review of the interlocutory order in Bowden's favor, the State (i) acknowledged that Bowden's claim was that he "was entitled to unconditional release from prison because he had fully served his entire life sentence" 30 years after it was imposed, given sentence-reduction credits, State's Petition for Discretionary Review, *State v. Bowden*, No. 514P08 (N.C. Sup. Ct. Nov. 20, 2008), at 2; *see also id.* at 3; (ii) acknowledged that the Court of Appeals' holding was that a § 14-2 prisoner has a "statutory right to have his sentence treated as an

eighty-year sentence for all purposes, including determination of an unconditional release date," *id.*; and (iii) acknowledged that the Court of Appeals' decision holds that [all § 14-2] prisoners "are entitled to unconditional release from prison," *id.* at 6; *see also id.* at 7. The State relied on N.C. Gen. Stat. § 7A-31(c), which authorizes interlocutory review only when "failure to certify would cause a delay in final adjudication which would probably result in substantial harm;" the interim "substantial harm" with which it was concerned was the *Bowden* decision compelling the immediate release of prisoners based on their sentence-reduction credits.

Second, days after the North Carolina Supreme Court let the Court of Appeals' decision stand in *Bowden*, (i) the Governor issued press releases stating that "[t]he court's decision . . . will force the early release of murderers and rapists serving life sentences," Press Release, *Gov. Perdue Appalled at Ruling that Cuts Short Life Sentences* (Oct. 15, 2009), *available at* http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemID=720, that "20 violent offenders ... will be released on Oct. 29 [the day the court's mandate would issue] and dozens more ... will be released in the next few years because of the court's ruling," *id.*, and that *Bowden* "meant offenders serving life in prison would be released after a mere 35 years," Press Release, *Statement from the Governor Regarding Prisoner Release* (Oct. 22, 2009), *available at* http://www.governor.state.nc.us/NewsItems/PressRelease Detail.aspx?newsItemID=727; (ii) the State published information on the 20 prisoners it said would be released on October 29, 2009 pursuant to *Bowden*, including petitioners Jones and Brown, http://www.governor.state.nc.us/NewsItems/UploadedFiles/7d5ae259-4b37-438d-b4d5-b7328f2e24ea.pdf; and (iii) the

State's appellate counsel in *Bowden* sent a letter to the editor of a North Carolina newspaper, complaining that the courts in *Bowden* failed to "show[] concern for public safety" and stating that "[t]he effect of the appellate court decisions in the *Bowden* case is that offenders found unsuitable for parole will be released from prison with no supervision whatsoever," E. Parsons, *Power pre-empted*, NEWS & OBSERVER (Oct. 23, 2009), *available at* http://www.newsobserver.com/opinion/letters/v-print/story/153788.html.

The State's position soon shifted, however, from resignation to defiance. Stating that "life should mean life"—contradicting the courts' authoritative reading of § 14-2 in *Bowden*—the Governor's October 22, 2009 press release called the prisoners' release after 35 years (in other words, at the end of their 80-year sentences as reduced by sentence-reduction credits) "unacceptable," and vowed that "offenders will not be turned loose." Press Release, *Statement from the Governor Regarding Prisoner Release* (Oct. 22, 2009), *available at* http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemID=727. On the same day, the Governor reportedly "joked with reporters about the possibility of being found in contempt of court. 'If I go to jail, are you going to visit me? Somebody told me that they were going to bring me cookies.'" WRAL.com, *Perdue has no plans to release inmates* (Oct. 22, 2009), *available at* http://www.wral.com/news/state/story/6261276/.

At that point, the State's position became a commitment—not to release the § 14-2 prisoners—in search of a rationale. The State first suggested that § 14-2 prisoners were ineligible to earn "day-for-day" sentence-reduction credits (for any purpose), and that previous State executive officials had erred in awarding

such credits. *See* Press Release, *Statement from the Governor Regarding Prisoner Release* (Oct. 22, 2009). The State subsequently abandoned that position, which was not supported by any statute or regulation. Later, the State switched to its current position, which is equally unsupported: that credits earned by § 14-2 prisoners apply "only for purposes of earning a more favorable custody grade, for becoming eligible for parole or when the Governor commutes a prisoner's sentence." Press Release, *State Implements Plan to Comply with State v. Bowden Ruling, Calculates Inmate Release Dates* (Nov. 19, 2009), *available at* http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemID=790.

The North Carolina Supreme Court's response in the decisions below brings to mind the maxim, "hard cases make bad law." The legal analysis of these cases is not complex. *See* section I, above. But they may have been hard cases for the North Carolina Supreme Court because (1) applying the law correctly would mean effectively ordering the unconditional release of over 100 prisoners, some of whom would likely be incarcerated longer had post-1970s North Carolina law governed their sentences; and (2) the North Carolina Supreme Court was being vehemently attacked in the media as soft on crime and dismissive of public safety by its fellow North Carolina elected officials.[5] Regrettably, the majority of the North Carolina Supreme Court chose to "defer" (Pet. App. 8a) to the State's unprincipled position. As the dissent remarked, "[t]oday's decision condones spontaneous rule-making by the

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[5] The Justices of the North Carolina Supreme Court are elected.

DOC that targets individuals retroactively, thereby abdicating this Court's role as a protector of Constitutional liberty rights." Pet. App. 31a (Timmons-Goodson, J., dissenting). In reaching that result, the North Carolina Supreme Court relied on a scattershot array of rationales that have no basis in law.

First, under the guise of "defer[ence]" to the State's "interpretation" of its sentence-reduction credit regulations, Pet. App. 8a, the North Carolina Supreme Court accepted the *result* demanded by the State without any examination of whether the State's newly minted litigating position had any basis in the text and history of the relevant laws. It appears that the State's assertion to which the court "defer[red]" was this:

> The Department of Correction has never used good time, gain time or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment.

Pet. App. 7a (quoting the DOC). The court noted that DOC had internally recorded a release date of "Life," with no determinate term, for petitioners. *Id.*

The State's past practice under statutes that provided (or that the State believed provided) for *indeterminate* life sentences cannot be considered an "interpretation"—much less, a defensible one—of the law applicable to the 80-year *determinate* sentences provided for by § 14-2. Nor can the State's belief that petitioners were not entitled to early unconditional release because they were subject to indeterminate sentences be due any deference, given that its legal premise—that they were subject to indeterminate sentences—has been definitively rejected by the North Carolina Supreme Court. Nor is the State's unannounced "in-

terpretation" supported by any citations or reasoning. Nothing in the text or history of the relevant statute and regulations suggests that a determinate term-of-years sentence is ineligible for sentence-reduction in the form of early unconditional release merely because it is nominally labeled "life."

Second, the North Carolina Supreme Court dismissed as "limited," and purported to re-weigh, petitioners' "interest" in the lawful termination of their sentences. Pet. App. 11a. Citing this Court's Due Process precedents, the North Carolina Supreme Court held that:

> Jones's liberty interest in good time, gain time and merit time is limited. Thus, his liberty interest, if any, in having these credits used for the purpose of calculating his date of unconditional release is *de minimis*, particularly when contrasted with the State's compelling interest in keeping inmates incarcerated until they can be released with safety to themselves and to the public.

Id. Such judicial re-weighing is entirely misconceived. If the State had never created a right for petitioners to have their sentence-reduction credits used to calculate their unconditional release dates, petitioners would have no interest to weigh, and no Due Process issue would arise. Given, however, that State law gave them that right, neither the State nor the courts are entitled to cancel earned sentence-reduction credits and effectively double the sentence based on public safety concerns that already were taken into account by the 1974 legislation and regulations governing petitioners' sentences. Once an inmate has served his sentence, as defined by law (including laws reducing his initial sen-

tence based on sentence-reduction credits), there is no room for the executive or the courts in effect to resentence him to further preventive detention based on an *ad hoc* interest-weighing analysis.

Finally, the North Carolina Supreme Court stated that:

> [a]ssuming without deciding that DOC's procedures for determining parole adequately protect an inmate's due process rights to consideration for parole, those procedures are also adequate to preserve [petitioners'] constitutional rights while still permitting the State to withhold application of [petitioners'] good time, gain time, and merit time to the calculation of a date for [their] unconditional release.

Pet. App. 11a-12a. This is plainly wrong. No procedure, however impeccable, used to inform the exercise of parole discretion, can protect, or substitute for, an accrued entitlement to unconditional release pursuant to the distinct and independent sentence-reduction credit regime.

Each of these erroneous rationales has grave implications for constitutional rights beyond the scope of this case. First, if a state's executive's assertions that it misunderstood the law enacted 35 years earlier and assumed it meant something else merited "defer[ence]" to what the state now wishes the law was, ignorance of the law would become not merely an excuse, but a reason to continue to incarcerate prisoners who have already earned their release. This Court has addressed in prior Due Process cases other efforts of states to "interpret" state laws contrary to their plain meaning, and has made clear that a failure to follow existing law is not reduced to a question of state law by labeling it "in-

terpretation." *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("an unforeseeable and unsupported state-court decision on a question of state [law] does not constitute an adequate ground to preclude this Court's review of a federal question"); *accord Douglas v. Buder*, 412 U.S. 430, 432 (1973) (same).

Second, if a prisoner's accrued right to unconditional release will not be enforced when a court considers a state's interests in public protection more weighty, determinate sentencing will lose all meaning and be replaced by *ad hoc* preventive detention.

Third, if a procedurally fair exercise of discretion on a different legal issue is deemed sufficient to substitute for an accrued right, the right will cease to be a right at all.

In sum, accepting the North Carolina Supreme Court's reasoning as precedent would deprive the Due Process and Ex Post Facto Clauses of much of their force. Alternatively, viewing the North Carolina Supreme Court's reasoning as rationalizations without significance for other cases would raise grave concerns about the independence of the judiciary in these and similarly politically charged cases. On either view, it is important that this Court act.

III. THE DECISIONS BELOW ARE LIKELY TO DEPRIVE OVER 100 PRISONERS OF MANY YEARS OF FREEDOM EACH, AND, MORE BROADLY, TO UNDERMINE CONFIDENCE IN SENTENCE-REDUCTION CREDIT PROGRAMS

The North Carolina Supreme Court's erroneous decision also raises broad and serious practical concerns. Last Term, because "the interests of a large number of federal prisoners" were involved, *Barber v. Thomas*, 506 U.S. ___, 130 S. Ct. 2499, 2504 (2010), this

Court granted certiorari to review a relatively narrow, technical, non-constitutional issue regarding one facet of sentence-reduction credits—good time credits under 18 U.S.C. § 3624(b)(1)—in the federal system. *Barber* involved no circuit split or conflict with this Court's precedent, but each of the two petitioners had "several months of additional prison time" at stake, *see Barber*, 130 S. Ct. at 2504. Although it implicates a smaller number of prisoners, this case presents even more compelling grounds for certiorari, both because it will determine whether petitioners and more than 100 others in North Carolina each face as much as *40 extra years* in prison, and because it raises grave constitutional issues and threatens to impair public confidence in the integrity of sentence-reduction credit programs.

For petitioner Jones, this Court's decision will determine whether he will be released immediately and unconditionally, having completed his sentence, as reduced by his sentence-reduction credits, in February 2006, or whether his sentence will continue through February 2055 (when he would be 100 years old). *See* Pet. App. 162a. For petitioner Brown, the corresponding dates are early 2009 versus August 2055 (when she would be 101 years old). *See* Pet. App. 169a-170a. Jones and Brown are not alone: a total of 136 prisoners in North Carolina are currently incarcerated based on 1970s convictions pursuant to the 80-year "life" sentencing provision, N.C. Gen. Stat. § 14-2 (1974). Most of those prisoners have earned years of sentence-reduction credit; for many, including petitioners, 40 or more years of their lives may be at stake.

More broadly, if allowed to stand, the decision below threatens to erode confidence in the systems of sentence-reduction credits that are widely used not only in North Carolina but in almost all federal and state juris-

dictions.[6] While members of the Court disagreed as to the correct interpretation of the federal statute at issue in *Barber*, there can be no disputing Justice Kennedy's statement that a failure to enforce sentence-reduction credits in accordance with the law under which they have been earned "will be devastating to the prisoners who have behaved the best and will undermine the purpose of the statute." *Barber*, 506 U.S. at __ , 130 S. Ct. at 2512 (Kennedy, J. dissenting). Prisoners in all jurisdictions can be expected to "turn[] to the statute books to figure out when to expect [their] freedom," *id.* at 2514, and to moderate their conduct in order to expedite their freedom when the statute books and regulations indicate that they can earn early release. Unless corrected by this Court, North Carolina's very public breaking of the social compact represented by its sentence-reduction regulations is apt to engender cynicism and harm prison morale and discipline.

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[6] "[M]ost states allow for good time, at least for most offenders." N. Demleitner, *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 Fla. L. Rev. 777, 783 (2009). Moreover, "[i]n both federal and state systems, most inmates are awarded the entire available amount of good time." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2011